Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

TECHNICAL ORDNANCE, INC., a Minnesota corporation, and NORMAN H. HOFFMAN, individually,
Petitioners,

vs.

DOUGLAS MOORE, special agent of the Bureau of Alcohol, Tobacco, and Firearms, U.S. Department of the Treasury,
Respondent,

and

JOHN DOE 1 through JOHN DOE V, unknown named agents of the ATF, and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jeff H. Eckland, *Counsel of Record*
William L. Roberts
Mark J. Blando
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

Attorneys for Petitioners

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in an interlocutory qualified immunity appeal presenting no issue of law, exceeded the scope of its jurisdiction when it overrode the trial court's factual findings and reversed its holding that genuine issues of material fact necessitated a trial.

2. Whether the Eighth Circuit, in an interlocutory appeal of the denial of summary judgment on qualified immunity grounds, applied the wrong standard of review when it failed to view the evidence in the light most favorable to the non-moving party and concocted a version of the facts that was so contrary to the evidence that not even the moving party had ever advanced it.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are Petitioners and plaintiffs in the action below:

Technical Ordnance, Inc.
Norman H. Hoffman

Pursuant to Rule 29.6, Petitioners state that Technical Ordnance, Inc. is a Minnesota corporation with its principal place of business in St. Bonifacius, Minnesota. Norman H. Hoffman is the President of Technical Ordnance, Inc. The company has no parent corporations or subsidiaries, and there are no publicly held companies that hold more than ten percent of its stock.

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TEXT OF RELEVANT STATUTES

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached hereto. *See* App. 75-83. The provisions most significant to the disposition of this petition are as follows:

18 U.S.C. § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

* * *

18 U.S.C. § 842. Unlawful acts

* * *

(f) It shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Secretary may be regulation require, including, but not limited to, a statement of intended use, the name, date, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom explosive materials are distributed. If explosive materials are distributed to a corporation or other business entity, such records shall include the identity and principal

and local places of business and the name, date, place of birth, and place of residence of the natural person acting as agent of the corporation or other business entity in arranging the distribution.

* * *

PETITION FOR CERTIORARI

Petitioners Technical Ordnance, Inc. (Tech-Ord) and Norman H. Hoffman (Hoffman) respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States District Court for the District of South Dakota issued four decisions denying defendant Douglas Moore's claims of qualified immunity: an April 14, 1997 order denying Moore's motion to dismiss, a May 19, 1997 order denying Moore's motion for reconsideration, a September 30, 1998 order denying Moore's first motion for summary judgment, and an October 29, 1999 order denying Moore's second motion for summary judgment. All of these decisions are unreported. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the trial court is reported at 214 F.3d 641 (2001).

JURISDICTION

The Eighth Circuit issued its opinion on March 26, 2001. Petitioners then timely filed a Petition for Rehearing or for Rehearing En Banc, which the court denied on August 15, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations relevant to the disposition of this Petition are 28 U.S.C. § 1291; 18 U.S.C. § 1001; 18 U.S.C. § 842; and 27 C.F.R. § 55.141. App. 75-83.

STATEMENT OF THE CASE

I. Overview

This case arises from a campaign waged by a rogue special agent of the Bureau of Alcohol, Tobacco and Firearms ("ATF") to bring the full force of the federal government down upon a small defense contractor, Technical Ordnance, Inc. ("Tech-Ord"), and its president,

Mr. Norman Hoffman. Agent Douglas Moore prepared a warrant affidavit filled with accusations about the company that he knew to be false and used the affidavit to obtain search warrants permitting the ATF to raid the company's facilities. Moore continued his spurious campaign against Petitioners by repeating the same lies in a case report that convinced federal prosecutors to seek an indictment against Hoffman and Tech-Ord, in his testimony before a grand jury that resulted in a thirty-six count indictment against them, and in his testimony at the ensuing criminal trial.

Moore's web of deceit finally unraveled at the criminal trial, when he admitted that statements he made in his warrant affidavit were not true. On cross-examination, Moore retracted his false statements and the prosecution's case collapsed. Both Tech-Ord and Hoffman were duly acquitted on all charges. Before rendering the verdict, the jury took the extraordinary measure of requesting permission from the Court to make a public statement about the case. After the verdict, the jurors made statements expressing their disbelief that the government had brought the charges because the government presented no evidence to show that Hoffman or Tech-Ord committed any crime.

Petitioners then brought this civil action against Moore under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Moore attempted to avoid having to stand trial for his misconduct by repeatedly filing motions in the trial court seeking dismissal of Petitioners' claims on qualified immunity grounds. Each time, the trial court rejected Moore's requests based on the sufficiency of Petitioners' allegations and the evidence presented. The trial court held, both before and after discovery, that there was more than sufficient evidence for a jury to conclude that Moore knowingly made material false statements and omissions in his warrant affidavit and that, given these false statements, the affidavit was not supported by probable cause to believe that either Hoffman or the company committed any crime.

On the eve of trial, however, Moore appealed to the Eighth Circuit. Despite the interlocutory nature of the appeal, the Eighth Circuit undertook a broad-ranging independent review of the factual findings made by the trial court. The court did not review any conclusions of law made by the trial court, but instead disagreed with its factual determination that a jury could find Moore's statements in his affidavit to be false. In short, the Eighth Circuit reversed the trial court's holding that genuine issues of material fact precluded granting summary judgment in favor of Moore.

II. Statement of Facts

A. The Nature of Tech-Ord's Business and the ATF's Knowledge Thereof

Tech-Ord is a small business based in St. Bonifacius, Minnesota that manufactures and sells defense articles, including propellant actuated devices ("PADs"). App. 172. Tech-Ord performs the vast majority of its work under contracts with the U.S. Department of Defense ("DOD"), in most cases as a subcontractor. *See* App. 134-35, 186. The company also sells some of its products to approved foreign governments pursuant to export licenses obtained from the U.S. Department of State.[1] According to a government form prepared by Tech-Ord in 1990, the company's non-DOD sales accounted for only 8.2% of its gross revenue. *Id.*

It is undisputed that the ATF lacks jurisdiction over sales made under contracts with the Department of Defense,

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[1] These foreign sales have been referred to by the parties under a variety of labels, including "foreign military sales" and "commercial sales." For clarity, this Petition will refer to sales under Department of Defense contracts as "DOD sales" and sales to foreign governments as "non-DOD sales." The record is clear that although the parties at times used different language to refer to these transactions, each party understood exactly what the other meant by the terms used. App. 47, 165 (Moore admitting that when Hoffman used the term "foreign military sales," Moore understood him to be referring to the transactions that ATF labels "commercial sales" – *i.e.*, non-DOD sales); *see also* App. 144.

including sales made under subcontracts with DOD prime contractors. The ATF has jurisdiction over sales of certain types of items to foreign governments, but that jurisdiction does not extend to sales of PADs – which comprised most, if not all, of the company's non-DOD sales during the relevant time period. *See* 27 C.F.R. § 55.141(a)(8). Notwithstanding the lack of clarity regarding the extent of ATF jurisdiction over Tech-Ord's operations, however, the company avoided any disputes with the agency by obtaining an ATF license once the agency took the position in 1989 that the company's operations fell within the ATF's jurisdiction. App. 173.

Thus, the ATF was well aware, by at least 1988, that Tech-Ord engaged in both DOD sales and non-DOD sales. The ATF described the company's business in a February 10, 1989 report as follows:

> Most of Technical Ordnance's work is done for the United States government either as a prime contractor or as a subcontractor to another industry member. They also contract directly with some foreign governments and ship to them under State Department permits.

App. 186. In 1990 and 1991, the ATF inspected Tech-Ord's records and found that the company was in full compliance with all applicable regulatory requirements. App. 191-195. Thus, before 1992, the ATF not only knew that Tech-Ord had disclosed that it engaged in non-DOD sales, it also knew that the company had obtained an ATF license for those sales and was satisfying the requirements of ATF regulations.

B. The Events of March 20, 1992

On March 20, 1992, Moore and another ATF agent came to Tech-Ord's manufacturing facility in Clear Lake, South Dakota, to conduct a surprise inspection. Their stated purpose was to investigate accidental explosions that had occurred earlier that year and check Tech-Ord's compliance

with the agency's prior request that it paint the angle iron in certain storage bunkers with non-static paint.

Upon Moore's arrival, he was met by Hoffman and another Tech-Ord representative, Mr. John Yuhas. Hoffman questioned whether the ATF had the authority to conduct the surprise inspection. Moore then inquired as to the nature of Tech-Ord's business, and Hoffman responded by telling Moore what he already knew: that Tech-Ord performed both DOD and non-DOD work. Moore then asked whether any non-DOD work was being performed at the facility at that time. To answer Moore's question, Hoffman and Yuhas retrieved a computer printout that listed all of the jobs in progress that day. The document showed that all of the work currently underway at the facility was being performed under a DOD contract or subcontract. App. 175, 183-184.

Thus, the only assertion that Hoffman made during this conversation was that Tech-Ord was not performing any non-DOD work at Clear Lake on the day of Moore's visit. Moore has admitted that this is how he understood Hoffman's remarks, given that Hoffman made the statements by reference to a computer run showing only the work that was being performed at Clear Lake on that day. App. 161, 162. Moore also knew that, regardless of whether the company was doing any non-DOD work that day, Tech-Ord in general conducted both DOD and non-DOD sales. App. 161 (admitting "I knew that ahead of time").

Following this exchange, Tech-Ord permitted the agents to conduct their inspection. Tech-Ord answered all of their questions about the prior explosions and escorted them on a tour of the facility. The agents inspected Tech-Ord's bunkers to verify that the angle irons had been painted as requested, and Tech-Ord even permitted them to peer into a bunker containing classified DOD material so that they could observe the angle iron. By the end of the day, the agents were satisfied that the company had adequately

addressed both of the issues that gave rise to the inspection: the painting of the angle irons and the accidental explosions that had occurred earlier that year. *See* App. 4.

Moore, however, displayed discernable indignation over Hoffman's questioning of the ATF's jurisdiction. Moore also took offense to the company's requests that he sign a guest register, wear a security badge, and wear safety footwear before entering certain areas. Moore refused to comply with any of these requests, even though they were required by applicable DOD rules and regulations. App. 174. Moore displayed his antagonism toward Hoffman by making threatening remarks, such as "do you realize that I wear a badge?," "do you know that I carry a gun?," and "do you understand that I can arrest people?" *Id.* Moore's animosity would develop into a personal vendetta against Hoffman and Tech-Ord that would lead him to devise a false account of the parties' discussions that day and then use that false account to pursue criminal charges against them.

C. Moore's False Warrant Affidavit

After the March 20, 1992 inspection, Moore prepared a warrant affidavit accusing Hoffman and Tech-Ord of making false statements in violation of 18 U.S.C. § 1001. Moore also asserted that, based on these false statements, the company must be out of compliance with the ATF's record-keeping regulations. Moore presented the affidavit to a U.S. Magistrate Judge on October 19, 1992 as grounds for permitting raids of Tech-Ord's facilities.

1. Moore's False Account of the Parties' Discussions on March 20, 1992

The central premise of Moore's affidavit was that Tech-Ord was attempting to avoid ATF jurisdiction over its operations by falsely claiming during the March 20, 1992 inspection that it performed all of its work under DOD contracts and did not perform any non-DOD work. According to the affidavit, Tech-Ord claimed that it "was not

engaged in any" non-DOD work and was "only involved in" DOD contracts. App. 146 & 147. As set forth in detail above, Tech-Ord never made any such assertion, and in fact stated just the opposite: that it performed both DOD and non-DOD work. As a result, Moore's assertion that Tech-Ord misstated the nature of its business was patently false.

Moore then contrasted Hoffman's alleged claim that Tech-Ord performed only DOD work with information showing what all the parties already knew: that Tech-Ord also performed non-DOD work. App. 146 & 147. In this manner, Moore was able to accuse Hoffman of lying by attributing to him a statement that he never made. Thus, it was *Moore* who lied by putting words in Hoffman's mouth and then using those imputed words to falsely state that there was reason to believe that *Hoffman* had lied.

Much of the argument between the parties in this case centers around Moore's use of the word "currently" in his affidavit. Although Moore twice stated in the affidavit that Tech-Ord claimed generally that it was not performing any non-DOD work, Moore also stated at one point in the affidavit that Tech-Ord claimed that it was not "currently" performing any such work. App. 139-140. Moore has made clear, however, that he intended all of these statements to be consistent with one another, because of what he meant when he used the term "currently." Moore claims that he understood Tech-Ord's statement that it was not "currently" performing any non-DOD work to mean that "while the company had engaged in [such sales] in the past, it had not done so recently, was not doing so now, and had no plans to [do so] in the foreseeable future." Apt. Br. at 32.

Thus, it is undisputed that Moore's affidavit conveyed that Tech-Ord was claiming that it did not perform any non-DOD work in general—not just that it was not doing any non-DOD work on March 20, 1992. As the trial court concluded, the "clear implication" of the affidavit "is that Hoffman had falsely portrayed matters and that Hoffman

was claiming that his entire operation fell under the purview of the DOD exemption." App. 28. Again, that assertion was manifestly false, in that Hoffman and Tech-Ord consistently had stated that the company performed both DOD and non-DOD work.

2. Moore's Finding of Probable Cause To Believe that Hoffman and Tech-Ord Violated the Law

Once Moore had falsely accused Hoffman of lying, it was very easy for him to draw the conclusion that Hoffman and Tech-Ord had violated federal law. This is because both of the crimes that Moore accused Hoffman and Tech-Ord of committing were directly based on the alleged false statements. First, Moore asserted that there was probable cause to believe that Hoffman made false statements in violation of 18 U.S.C. § 1001, which makes it a crime to make any materially false statement to a government official. To establish a violation of this statute, Moore simply repeated his false accusation that Hoffman had lied:

> Norman Hoffman . . . stated that the company was not engaged in any commercial sales [*i.e.*, non-DOD sales] or transactions of explosives, specifically sales to foreign customers or governments. Hoffman sated that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping. App. 146.

Second, Moore asserted that the very same allegedly false statements supported probable cause to believe that Tech-Ord had violated 18 U.S.C. § 842(f), which requires a party who holds an ATF license to maintain records in accordance with ATF regulations. To make out a case for this violation, Moore repeated his allegation that Hoffman had falsely claimed that "all activities at the Clear Lake facility were related to U.S. Department of Defense contracts and therefore exempt from ATF regulation." Moore then concluded that given these alleged false statements, "either

no records are being maintained" for the company's non-DOD work "or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations." App. 147-148.

Based on these alleged violations, Moore warranted that he had reason to believe that Tech-Ord was concealing certain property, including records and explosives sold in violation of federal law. App. 136. Moore's affidavit and a materially identical affidavit were presented to federal magistrate judges in South Dakota and Minnesota on or about October 19, 1992. The warrants then were issued on the basis of Moore's false accusations, permitting twenty-one federal agents to descend upon Tech-Ord's two facilities on October 21 to 22, 1992, to conduct search raids for the "concealed property" that allegedly would show illegal activity by Hoffman and Tech-Ord. *See* App. 136, 180.

D. Moore's Enduring Campaign Against Petitioners

The raids produced no credible evidence of any illegal activity by Hoffman or Tech-Ord. Nonetheless, Moore was able to continue the criminal process against them by perpetuating the same lies he originally made in his warrant affidavit. Moore persisted in his assertions that Tech-Ord was attempting to sidestep the ATF's jurisdiction by falsely claiming that all of its work was performed under DOD contracts. In February 1993, Moore prepared a criminal case report in which he again falsely alleged that Hoffman and Tech-Ord had attempted to conceal the fact that the company performed non-DOD work. App. 152 (alleging that Hoffman "made false statements claiming that Technical Ordnance, was *exclusively* engaged in DOD contracts and participated in *no activity* relating to commercial transactions") (emphasis added).

The false statements in the case report convinced federal prosecutors to seek an indictment against Hoffman and

Tech-Ord. Moore then testified before the grand jury, where he again falsely asserted that Hoffman had claimed that Tech-Ord conducted only DOD sales. App. 155 (testifying that Hoffman claimed: "I function entirely under the Department of Defense and therefore [am] exempt" from ATF regulation). Moore also made clear that the company's alleged lies were the entire basis for the government's case. App. 158 (testifying that Tech-Ord "has maintained all along they are not engaged in any commercial activity and that's basically the nature of this case").

Moore's false testimony caused the grand jury to return multiple indictments against Tech-Ord and Hoffman. Moore then served as a key witness for the prosecution in the criminal trial against Hoffman and Tech-Ord. Finally subjected to cross-examination, Moore was asked about the critical March 20, 1992 discussions between the parties. When asked whether Hoffman had stated that day that Tech-Ord performs both DOD and non-DOD work, Moore responded: "No. He said that he exclusively did nothing but Department of Defense contracts." App. 163. Asked the same question a second time, Moore again responded: "No. His words were, we do exclusively Department of Defense contracts." *Id.* Moore was asked the question a third time, and he yet again responded "No." *Id.*

Moore was then impeached, however, at which point he finally admitted the truth: that Hoffman in fact had stated on March 20, 1992 that the company engaged in both DOD and non-DOD work. When asked a fourth and final time whether Hoffman had stated on March 20, 1992 that the company engages in *both* DOD *and* non-DOD work, Moore finally recanted and responded "Yes." App. 165. Thus, Moore's testimony revealed that the entire basis for the criminal proceedings brought against Hoffman and Tech-Ord was a sham – an alleged false statement that Moore finally admitted was never made.

Moore's admission proved fatal to the prosecution's case. Hoffman and Tech-Ord were acquitted on all thirty-six counts. App. 166-169. After returning the verdict, the jury took the remarkable step of requesting permission from the judge to make a public statement about the case. App. 170. The jury members then spoke to the media to express their astonishment that the case had been brought; one juror noted that the case "should have been settled over coffee." App. 180, 197.

III. Proceedings Below

A. Proceedings Before the United States District Court for the District of South Dakota

Petitioners filed the current action in the United States District Court for the District of South Dakota on October 19, 1994. In their amended complaint, Petitioners asserted four counts against Moore and other unnamed agents under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), based on violations of their constitutional rights secured by the First, Fourth, and Fifth Amendments to the United States Constitution. App. 105-113.[2] Four times–in a motion to dismiss, a motion for reconsideration, and two motions for summary judgment–Moore asked the district court to dismiss the claims against him on the ground that he enjoys qualified immunity for his actions. Four times the district court rejected Moore's arguments.

In a decision dated April 14, 1997, the district court denied Moore's motion to dismiss on qualified immunity grounds. The court first noted that there was no dispute between the parties that making material false statements in a warrant affidavit violates clearly established law under the Fourth Amendment. App. 26; *see Franks v. Delaware*, 438 U.S. 154 (1978). The court then found that Petitioners' allegations

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[2] Petitioners also asserted three counts against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 et seq., and requested an injunction preventing further harassment against them. App. 116-121

sufficiently set forth a violation of the Fourth Amendment under *Franks*. App. 29. In particular, the court pointed to Petitioners' allegations that while Moore claimed in his affidavit that Hoffman "stated that the company was not engaged in any" non-DOD sales and was "only involved in" DOD sales, Moore later admitted at the criminal trial that Hoffman had in fact told him (Moore) that the company was engaged in both DOD sales and non-DOD sales. App. 28.

Moore sought reconsideration of the court's order, arguing, among other things, that Petitioners' allegations were too "conclusory" to survive a motion to dismiss. The trial court responded by order dated May 19,1997 that the allegations were "anything but conclusory" and denied Moore's motion. App. 39. Moore then filed an appeal to the Eighth Circuit to challenge the trial court's denial of his motion to dismiss. Shortly before his brief was due, however, Moore abandoned the appeal. *See Technical Ordnance, Inc. v. Moore*, No. 97-3046SDP.

Back before the trial court, Moore filed a pre-discovery motion for summary judgment in which he again sought dismissal of the claims against him on qualified immunity grounds. Even without the benefit of a full discovery record, the trial court held in a decision dated September 30, 1998 that there was sufficient evidence to support Petitioners' claims. For example, the court determined that the evidence supported the conclusion that Moore:

> did not have any reasonable basis to believe that Hoffman had made a false statement. On the day of the inspection, he knew that Technical Ordnance was working on only DOD contracts. Hoffman told Moore, however, that Technical Ordnance manufactured and sold products both to fulfill DOD contracts and foreign military sales, which Moore knew included what ATF considered non-exempt commercial sales.

App. 56. The court also found that Moore's false statements were material in that, without them, "the affidavit fails to establish probable cause for the issuance of the warrant." *Id.* The court concluded that Moore was not entitled to qualified immunity, in that "[a] reasonable officer would have known there was no probability or even possibility of criminal activity." App. 57.

Moore again declined to obtain appellate review of the trial court's qualified immunity decision. Discovery then proceeded, and Petitioners gathered additional evidence establishing that the affidavit contained material false statements. After the completion of discovery, Moore again moved for summary judgment, and the court again denied Moore's motion on October 29, 1999. It found, based on the evidence presented, that "[a] reasonable trier of fact could conclude that Moore's affidavit was not based upon probable cause and was knowingly false." App. 63-64. Among other things, the court found that:

> During the inspection, Hoffman and the inspectors looked at current printouts of Technical Ordnance's jobs in progress which showed only exempt projects were being worked on at that time. Thus, Hoffman's statement that Technical Ordnance is "currently" working on only DOD contracts was not inaccurate and Moore knew that.

App. 63. Thus, the court held that Petitioners were entitled to a trial on their *Franks* claim.

On the eve of trial, however, Moore finally appealed to the Eighth Circuit. Upon learning that Moore intended to appeal, the trial court judge issued a memorandum to the parties stating: ". . . I do not believe there is any legal basis at all for an appeal (given that the Court has only determined that factual issues should be resolved at trial) . . . ." App. 130.

B. Proceedings Before the Eighth Circuit

The Eighth Circuit initially appeared to share the trial court's concern about whether the appeal was proper. The Clerk of Court notified the parties on December 29, 1999 as follows:

> This appeal has been sent to a panel of judges for review. You will be notified of any decision entered by the Court or whether a briefing schedule will be established.

App. 132. The court nonetheless allowed the appeal to go forward. As Petitioners later maintained in their brief on appeal, the only legal issues properly before the court related to their claims under the First Amendment and the common law tort of malicious prosecution. Although the court properly addressed these issues on appeal, it also chose to make a purely factual examination of Petitioners' *Franks* claim.

In its opinion, the Eighth Circuit reversed the trial court's holding that genuine issues of material fact precluded granting summary judgment in favor of Moore on Petitioners' *Franks* claim. Although Petitioners had argued in their brief that the court lacked jurisdiction over their *Franks* claim, the Eighth Circuit gave short shrift to the issue in its opinion. The court noted only that the fact issues identified by Petitioners were not, in its view, "material," and that the parties drew "differing legal conclusions from what was said and done." App. 8. In making this determination, however, the court overlooked the many disputes between the parties as to just "what was said and done." Instead, the court proceeded to present its own account of the facts, with barely any references to the record.

To reach its conclusion that Moore was entitled to qualified immunity, the court purged Moore's affidavit of any falsity by devising a wholly new account of what it was intended to convey. Although Moore himself had always

contended that Tech-Ord claimed that it performed only DOD work and thus was totally exempt from ATF jurisdiction, the Eighth Circuit found that "Moore never stated in his affidavit that Hoffman claimed that Ordnance only performed DOD contracts." App. 12. And although Moore had always admitted that his affidavit was intended to cast Hoffman's statement that the company was not "currently" performing any non-DOD work as a general statement going beyond the work being performed at the Clear Lake facility on March 20, 1992, the court found that "[t]he affidavit indicates that Moore understood Hoffman to say that Ordnance was not engaged in direct sales to foreign governments *on that day*." *Id.* (emphasis added). By imposing its own interpretation of the affidavit, the court was able to transform Moore's false statements into accurate ones and thereby grant him qualified immunity.[3]

Petitioners filed a Petition for Rehearing, noting that the "facts" set forth in the court's decision were contrary to the evidence of record and that the court had adopted a version of the evidence that Moore had never even advanced. The court ordered Moore to submit an answer to the petition. In his answer, Moore failed to address the fact that the Eighth Circuit's assessment of the facts was so favorable to Moore that it went beyond his own arguments. Moore also stopped short of agreeing with the Eighth Circuit's unfounded factual determinations, instead attempting to argue that Petitioners simply had taken the court's statements "out of context." The Eighth Circuit denied the petition, though Chief Judge Wollman would have granted it. App. 74.

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[3] The court also concluded that, even if the affidavit were amended to state that Tech-Ord had stated it generally performed some non-DOD work but maintained it was not performing such work at Clear Lake on March 20, 1992, Moore still would have had probable cause to believe that Hoffman and Tech-Ord had lied. In making this determination, however, the court once again ignored the disputed fact issues presented by the record and adopted a view of the evidence that went beyond any argument that Moore had ever made.

REASONS FOR GRANTING THE PETITION

This Court has clearly delineated the standards governing the scope of appellate jurisdiction and the proper standard of review in interlocutory appeals brought on qualified immunity grounds. The appellate courts, in general, have followed those standards to achieve a balance between the need for appellate review of qualified immunity determinations, on the one hand, and the need to maintain a clear division between the respective roles of trial courts and appellate courts in qualified immunity cases, on the other.

In this case, however, the Eighth Circuit turned those standards upside down by asserting jurisdiction over a case involving no question of law and then overriding the trial court's assessment of the evidence to reverse its holding that material fact issues remained for trial. The opinion thus defies the precedent of this Court and sharply conflicts with the decisions of other appellate courts on the proper scope of appellate review in an interlocutory appeal brought on qualified immunity grounds. The Court should grant certiorari to clarify the proper bounds of appellate review in a case such as this and restore the proper balance of authority between trial and appellate courts in qualified immunity appeals.

I. The Eighth Circuit Exceeded Its Authority By Taking Jurisdiction, Not To Resolve Any Issue Of Law, But Only To Dismantle The Trial Court's Factual Findings.

A. Appellate Courts Lack Jurisdiction To Review "Sufficiency Of The Evidence" Determinations By Trial Courts On The Issue Of Qualified Immunity.

Interlocutory orders, such as orders denying summary judgment, generally are not immediately appealable as of right. *Johnson v. Jones*, 515 U.S. 304, 309 (1995) (noting that "interlocutory appeals are the exception, not the rule"). This is because 28 U.S.C. § 1291 grants appellate courts

jurisdiction only over the "final decisions" of district courts. *Id.* A collateral order qualifies as a "final decision" only where it meets three requirements: it must conclusively decide the disputed question, resolve an important issue separate from the merits, and be effectively unreviewable on appeal from final judgment. *Id.* at 310-11; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Johnson also explained how the "final decision" requirement applies in qualified immunity appeals. The Court held that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319-20. The Court further held that appellate jurisdiction exists over interlocutory orders denying qualified immunity only to the extent that they present "abstract questions of law." Thus, a trial court order rejecting a qualified immunity defense is immediately appealable only when "the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain *given facts* showed a violation of 'clearly established' law." 515 U.S. at 311 (emphasis added); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

Shortly after its ruling in *Johnson*, the Court confirmed in *Behrens v. Pelletier*, 516 U.S. 299 (1996) that appellate courts lack jurisdiction over mere "sufficiency of the evidence" questions:

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the

> plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.

Id. at 313 (citations omitted).

In sum, appellate courts presented with interlocutory appeals of trial court orders denying qualified immunity have jurisdiction only to review "abstract questions of law" —typically, whether the constitutional right at issue was "clearly established." *Behrens*, 516 U.S. at 313; *Garrett v. Startman*, 254 F.3d 946, 952 n.8 (10th Cir. 2001) (the "quintessential issue of law" is whether the right at stake was clearly established). Conversely, appellate courts lack jurisdiction where the sole question on appeal is the correctness of the trial court's determination that there was sufficient evidence to show that the particular conduct alleged by the plaintiff occurred. As this Court explained in *Johnson*, this approach strikes the proper balance between the respective roles of the trial and appellate courts:

> the issue at stake here–the existence, or nonexistence, of a triable issue of fact–is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters.

515 U.S. at 315-16.

B. The Eighth Circuit Lacked Jurisdiction To Review The Trial Court's Determination That There Was Sufficient Evidence To Show That Moore Made Material False Statements In His Affidavit.

1. There Was No Legal Issue Before The Eighth Circuit Regarding Petitioners' *Franks* Claim.

In this case, there is no dispute that lying in a warrant affidavit to establish probable cause violates clearly established rights under the Fourth Amendment. *See Franks v. Delaware*, 438 U.S. 154 (1978). The Eighth Circuit acknowledged as much, and thus did not in any way

purport to base its jurisdiction on the question of whether the right at issue was sufficiently "clearly established." App. 9 ("A warrant issued on the basis of an affidavit that shows probable cause only because it contains a deliberate or reckless falsehood or omission violates the Fourth Amendment."). In fact, the Eighth Circuit did not reference a single legal issue through its entire discussion of Petitioners' *Franks* claim on which its jurisdiction might have been based. *See* App. 9-15.

The closest the court came to identifying a legal issue with respect to Petitioners' *Franks* was its somewhat cryptic statement that "[t]he parties do draw differing legal conclusions from what was said and done." App. 8. If this was intended as a reference to the fact that Moore argued that he was entitled to qualified immunity while Petitioners argued that he was not, that alone is not enough to vest the court with jurisdiction—particularly when the parties' difference of opinion stems from their divergent views of the evidence. *See supra* at 16-18; *cf. Canter v. County of Ostego*, 2001 WL 814937 (6th Cir. July 12, 2001) (attempts to couch appeal in terms of legal, rather than evidentiary, arguments rejected as "thinly-veiled attempts to challenge the correctness of the district court's conclusion regarding the sufficiency of the evidence"). Indeed, since the parties in every qualified immunity appeal will disagree on whether the defendant is entitled to immunity, such an all-encompassing rule would render every trial court denial of qualified immunity immediately appealable.

2. The Eighth Circuit's Analysis of Petitioners' *Franks* Claim Amounted To No More Than A Disagreement With The Trial Court's Review Of The Evidence.

Without any issue of law to address, the Eighth Circuit ventured into an independent analysis of the facts before the trial court. In doing so, the Eighth Circuit decided the very question it lacked jurisdiction to review: whether the trial

court had correctly determined that the evidence was sufficient to support the conclusion that the "particular conduct" alleged by Petitioners occurred. *See Behrens v. Pelletier*, 516 U.S. at 313.

The "particular conduct" alleged by Petitioners was simply that Moore made material false statements in his warrant affidavit. The trial court found sufficient evidence to support the conclusion that this particular conduct occurred, *i.e.*, that Moore lied in his warrant affidavit in order to show probable cause. For example, the trial court found that:

- While Hoffman stated that Tech-Ord performed both DOD and non-DOD work, Moore asserted in his affidavit that Hoffman had claimed that the company "was only involved in" DOD sales and "was not engaged in any" non-DOD sales. App. 28, 55-57.
- While Moore knew that Hoffman had asserted no more than that the company was performing only DOD work on March 20, 1992, Moore asserted in his affidavit that "Hoffman had falsely portrayed matters and that Hoffman was claiming that his entire operation fell under the purview of the DOD exemption." App. 28, 63.

These determinations by the trial court were entirely fact-based. The question of whether Moore lied in his affidavit involves a comparison of two purely factual matters: (1) what he knew, versus (2) what he conveyed in his affidavit. If Moore knew that Hoffman's statements were accurate, but prepared an affidavit accusing Hoffman of lying, then clearly Moore made false statements in his affidavit to procure a search warrant – a classic *Franks* violation. The trial court found that the evidence supported the conclusion that this was precisely what happened. App. 63 (holding that "Hoffman's statement that Technical Ordnance is 'currently' working on only DOD contracts was

not inaccurate and Moore knew that"). Thus, the trial court's holding with respect to Petitioners' *Franks* claim was a clear "sufficiency of the evidence" determination which the Eighth Circuit lacked jurisdiction to review.

Further, there can be no doubt that Moore's knowingly false statement (that Hoffman lied) was material to his finding that there was probable cause to believe that Petitioners violated the law. This is because the crime that Moore alleged Hoffman and Tech-Ord committed was the crime of lying to a federal official in violation of 18 U.S.C. § 1001. App. 146. All Moore had to do to fabricate a case that Hoffman violated the statute was to accuse Hoffman of lying to him. Indeed, it is hard to imagine a context in which an alleged false statement made to a federal agent could be more material to a probable cause determination than in the context of an alleged violation of 18 U.S.C. § 1001, which makes precisely that conduct a crime.[4]

In sum, the trial court found, based on its review of the evidence, that Moore accused Hoffman of making a statement that Moore knew Hoffman never actually made: that the company performed only DOD work and thus was entirely exempt from regulation by the ATF. The trial court further found that Moore's lie about Hoffman's supposedly false statement was material to his determination that there was probable cause to believe that Hoffman and Tech-Ord had lied and violated the law. Thus, the trial court correctly concluded that there were genuine issues of material fact with respect to Petitioners' *Franks* claim. Under the clear precedent of this Court, the Eighth Circuit lacked

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[4] The other crime that Moore accused Hoffman and Tech-Ord of committing was also directly tied to Hoffman's allegedly false statements. Moore asserted that because Hoffman had falsely claimed an exemption from ATF regulations by claiming that the company performed only DOD work, the company must be failing to maintain records as required by the ATF, which constitutes a violation of 18 U.S.C. § 842(f). App. 146-148.

jurisdiction to review this classic "sufficiency of the evidence" determination by the trial court.

C. The Eighth Circuit's Analysis Of Petitioners' *Franks* Claim Sharply Conflicts With The Decisions Of The Other Circuit Courts

The decision below stands apart from the other circuit courts that have addressed denials of qualified immunity in cases alleging Fourth Amendment violations under *Franks*. Other courts of appeal have correctly applied the precedent of this Court to refuse jurisdiction where the only issue presented is whether the plaintiffs' allegations, or the evidence presented, support the conclusion that the defendant made false statements in a warrant affidavit in order to establish probable cause.

In *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), for example, the plaintiff alleged that the defendant violated clearly established law by "knowingly including false information in a sworn affidavit." *Id.* at 1154. The trial court held that the plaintiff had sufficiently set forth a claim under *Franks* that the defendant made false statements in his affidavit to show probable cause. On appeal, the Tenth Circuit agreed that the plaintiff had set forth "a classic *Franks* violation" that was "clearly *legally* sufficient." *Id.* at 1154 (emphasis in original). The court also concluded, after carefully considering *Johnson* and *Behrens*, that it was without authority to second-guess the lower court's evaluation of the evidence:

> [W]e must scrupulously avoid second-guessing the district court's determinations regarding whether Clanton has presented *evidence* sufficient to survive summary judgment. Rather, we review only whether Cooper's conduct, as alleged by Clanton, violated clearly established law.

Id. at 1153 (citations omitted; emphasis in original). Thus, the court held that "the district court found there was a

genuine dispute over material facts and that is the kind of ruling that we lack jurisdiction to review in an interlocutory appeal." *Id.* at 1154-55 (*citing Johnson*, 515 U.S. at 313).

The courts of appeal have followed the same approach in reviewing denials of qualified immunity in other contexts. *See, e.g., Gross v. Pirtle*, 245 F.3d 1151, 1157-58 (10th Cir. 2001) (dismissing appeal for lack of jurisdiction where "genuine issues of material fact remain concerning whether [the defendant] had probable cause" and "further review would necessitate an assessment of the district court's evidentiary conclusions"); *Diaz v. Martinez*, 112 F.3d 1, 4-5 (1st Cir. 1997) (refusing jurisdiction over deliberate indifference claim where defendant was merely arguing "that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context"); *Genas v. State of New York*, 75 F.3d 825 (2d Cir. 1996) (declining to take jurisdiction over retaliation claim where trial court "found that a factual dispute exited as to whether defendant intended to retaliate against plaintiff").

Thus, the Eighth Circuit's assertion of jurisdiction in this case cannot be harmonized with the decisions of its sister courts. While the other courts of appeal have properly applied the standards set forth by this Court governing appellate review of qualified immunity determinations, the Eighth Circuit defied those standards and exceeded the scope of its jurisdiction.

II. The Eighth Circuit Ignored The Proper Standard Of Review By Failing To View The Evidence In The Light Most Favorable To Petitioners And Adopting A Version Of The Facts That Moore Never Advanced.

The only way that the Eighth Circuit could create the semblance of a legal issue with respect to Petitioners' *Franks* claim was by devising its own version of the facts and then treating those "facts" as undisputed. By misstating the evidence and failing to view the facts in the light most

favorable to Petitioners, the court turned the standard of review in summary judgment cases on its head. *See Behrens*, 516 U.S. at 309 (courts must view the evidence "in the light most favorable to the plaintiff" in qualified immunity appeals); *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (holding that appellate courts in qualified immunity appeals must give the plaintiff "the benefit of the doubt with regard to any disputed issues of fact"), *cert. denied*, 531 U.S. 1071 (2001); *see also Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001) (holding, in appeal of denial of summary judgment in *Bivens* action, that the first step in the qualified immunity analysis is to determine whether "a violation could be made out on a favorable view of the parties' submissions").

A. The Eighth Circuit Misconstrued The Record To Find That A Corrected Affidavit Would Show Probable Cause.

The Eighth Circuit found that if Moore's affidavit were corrected to state that Tech-Ord had acknowledged that it engaged in non-DOD work but that no such work was being performed at Clear Lake on March 20, 1992, "the affidavit would still have contained probable cause that officers of the company had lied and were not keeping records required by ATF regulation." App. 12. To support this conclusion, the court culled a smattering of facts from the record, misconstrued them, and presented them in a light more favorable to Moore than even he had advocated.

First, the court found that, although Tech-Ord had stated on March 20, 1992 and two earlier dates that only DOD work was being performed at Clear Lake, "other information contradicted these assertions." App. 12-13. The supposedly contradicting information consisted of materials that the court construed as suggesting that the company performed most of its work under contracts with foreign governments and did very little DOD work. *Id.* The evidence shows, however, that around the relevant time period, only

approximately 8% of the company's revenue came from sales to foreign governments. App. 135. Further, although Moore knew that Tech-Ord's work as a subcontractor under DOD prime contracts was exempt from ATF regulation, he relied on information relating solely to Tech-Ord's DOD prime contracts (*see* App. 143)–which represent only a small percentage of the company's DOD work. Thus, at the very least, the record presents disputed facts regarding the extent of the company's non-DOD work. The Eighth Circuit erred by resolving these fact issues in favor of Moore.

The court also concluded that three other "facts" supported Moore's finding of probable cause–none of which Moore had ever relied on as supporting his probable cause determination. App. 13. Indeed, Moore could not have made any such assertions consistent with the evidence:

- The court noted that accidental explosions had occurred at Clear Lake, which Tech-Ord reported to DOD but not to the ATF. The evidence before the trial court shows, however, that (1) Tech-Ord did inform the ATF about the explosions, but was told that no ATF report was necessary (*see* App. 140), and (2) the explosions occurred on assembly lines involving only DOD work, so that Tech-Ord was only required to report them to DOD, as it did.

- The court stated that a Tech-Ord officer "lied to agents when he claimed that a bunker contained classified DOD materials." App. 13, 14. The evidence before the trial court shows, however, that Moore never disputed that the bunker at issue *did* in fact contain classified DOD materials. Although no work was being performed under that particular DOD contract at the time of Moore's visit, the classified materials remained in the bunker and retained their classified status. App. 96; *see* Industrial Security Manual for Safeguarding Classified Information (DOD 1987) at 7, 270-72. Indeed, contrary to the court's view of the evidence, Moore acknowledged

in his affidavit that Hoffman claimed a "DOD exemption based on the *storage* of classified materials," not on the existence of an ongoing DOD contract. App. 140.

- The court found that a DOD inspector had stated that Tech-Ord's records were in "total noncompliance." App. 13. The evidence before the trial court shows, however, that the DOD official (who was not in fact an "inspector") was referring only to DOD requirements, and had nothing to say about whether Tech-Ord complied with ATF requirements. Further, Moore knew, before submitting his affidavit, that an ATF Chief had found that Tech-Ord was in compliance with ATF records regulations. *See* App. 194-195.

B. The Eighth Circuit Rewrote The Affidavit To Omit Moore's False Statements.

The heart of the Eighth Circuit's misapprehension of the evidence lies in the following excerpt from its opinion:

> Moore never stated in his affidavit that Hoffman claimed that Ordnance only performed DOD contracts. The affidavit indicates that Moore understood Hoffman to say that Ordnance was not engaged in direct sales to foreign governments on that day.

App. 12. Thus, the court imposed its own interpretation of what Moore *understood* Hoffman to state and what Moore *intended* to convey in the affidavit—classic examples of fact questions that are reserved for decision by the finder of fact at trial, not by an appellate court on interlocutory appeal.

The court's conclusion that the affidavit conveyed that Moore understood Hoffman to be referring only to the work that the company was performing *that day* is truly remarkable when contrasted with Moore's own arguments on appeal. Moore has always asserted just the opposite: that he intended to convey that Hoffman *was* claiming a general exemption from ATF regulation on the grounds that

the company performed exclusively DOD work. In fact, Moore has repeatedly chastised Petitioners for asserting that when Hoffman used the term "currently," he was referring only to the work being performed that day:

- . . . the word "*currently*" cannot possibly have meant "on that day only," as plaintiffs contend . . . .
- Nor is there any basis for the plaintiffs' assertion that when they told Moore and Kratichvil on March 20 that they were "*currently*" working only on DOD contracts, they meant "on that day only."
- Given these circumstances, no reasonable English speaker engaged in conversation with Hoffman and Yuhas would have understood them to mean "on that day only."
- The plaintiffs weakly suggest that the word "*currently*" had to mean "on that day only" . . . .

Apt. Br. at 16, 18, 32; Reply Br. at 8; (emphases in original).

Thus, Moore has disagreed with, and even ridiculed, the very notion that the Eighth Circuit accepted as an undisputed fact. Contrary to the Eighth Circuit's version of the facts, Moore had always argued that when Hoffman claimed that he was not "currently" performing any non-DOD work, he was claiming a full exemption from ATF jurisdiction on the grounds that the company did not perform any non-DOD work at all:

> a typical speaker of English would not understand them to be talking about <u>that day only</u>. Rather, that typical speaker of English would understand them to be saying that while the company had engaged in [non-DOD work] in that past, it had not done so recently, was not doing so now, and had no plans to [do so] in the foreseeable future.

Apt. Br. at 32 (emphasis in original).

This is the same interpretation that Moore gave to the words in his affidavit throughout the criminal proceedings against Petitioners. In his case report, Moore alleged that Hoffman "made false statements claiming that Technical Ordnance, was *exclusively* engaged in DOD contracts and participated in *no activity* relating to commercial transactions" App. 152 (emphasis added). Before the grand jury, Moore testified that Hoffman claimed: "I function entirely under the Department of Defense and therefore [am] exempt" from ATF regulation. App. 155; *see also id.* at 158 (testifying that Tech-Ord "has maintained all along they are not engaged in any commercial activity and that's basically the nature of this case"). Finally, before being impeached at the criminal trial, Moore testified that Hoffman "said that he exclusively did nothing but Department of Defense contracts" and that Hoffman's "words were, we do exclusively Department of Defense contracts." App. 163.

Thus, while the Eighth Circuit read the affidavit as conveying that Hoffman claimed only that Tech-Ord was performing solely DOD work on the day of March 20, 1992, the evidence and Moore's arguments and admissions make clear that he was asserting that Hoffman had claimed that the company in general did not perform any non-DOD work at all and was thus totally exempt from ATF regulation.

Indeed, any other interpretation would drain the affidavit of probable cause. Significantly, Moore has never asserted that there was probable cause to believe that Tech-Ord was performing non-DOD work on March 20, 1992. The record bears out that all of the work that Tech-Ord was performing that day was under DOD contracts, and Moore never had any reason to believe otherwise. App. 183-184, 175-176. Consequently, if the Eighth Circuit was correct in interpreting the affidavit to mean that Hoffman claimed only that Tech-Ord was performing solely DOD work on March 20, 1992, no probable cause existed for any search because Tech-Ord was not, in fact, performing any non-

DOD work on that day. Thus, the affidavit would support probable cause to believe that Hoffman lied only if his statements are understood as Moore has cast them: that Hoffman was claiming a broad exemption from ATF jurisdiction going beyond March 20, 1992, such that he would be falsely maintaining that Tech-Ord never did any non-DOD work.

The Eighth Circuit's interpretation of the affidavit also fails as matter of pure logic. As the court noted in its opinion, Moore stated that he asked Hoffman why Tech-Ord held an ATF license if the company performed only DOD work. App. 4. In addition, Moore stated in his affidavit that because Tech-Ord supposedly had claimed that it performed only DOD work, the company must be maintaining either false records or no records regarding its non-DOD work. App. 147-148. If Moore's affidavit were read to convey, as the Eighth Circuit has construed it, that Moore understood Hoffman to have claimed that Tech-Ord performed some non-DOD work but happened not to be doing any on that particular day, there would have been no reason for Moore to ask Hoffman why the company held an ATF license, and there would have been no basis for Moore to conclude that Tech-Ord was failing to maintain required records related to its non-DOD work. The only logical reading that gives meaning to the entire affidavit is the reading that Moore himself has always given it: that Tech-Ord was asserting that it did not perform any non-DOD work *at all* and thus was entirely exempt from ATF jurisdiction. *See United States v. Anderson*, 933 F.2d 612, 614 (8th Cir. 1991) (warrant affidavits are to be read "as a whole").

Finally, the Eighth Circuit's mischaracterization of the evidence is not saved by its view that any factual disputes between the parties as to what Hoffman said–and what Moore said that Hoffman said–are not material. This is because, again, the crime that Moore accused Hoffman and Tech-Ord of committing was making false statements to a

federal official. If Hoffman did not lie, and Moore knew that, then clearly Moore lacked probable cause to believe that Hoffman made a false statement in violation of 18 U.S.C. § 1001. Thus, in this context, there can be no dispute that Moore's false assertion that Hoffman lied was "material" to his finding of probable cause.

* * *

The Eighth Circuit's unsupported and one-sided assessment of the evidence should not be permitted to stand. By misstating the record and ignoring the many material fact disputes presented therein, the court defied the proper standard of review on summary judgment. The court not only failed to view the facts in the light most favorable to Petitioners, it went a step beyond and viewed the facts in a light more favorable to Moore than he had ever put forth.

Thus, the Eighth Circuit found a way to grant Moore qualified immunity in this matter only by turning the very nature of the case on its head. This case had always been about the fact that Moore prepared an affidavit in which he accused Hoffman of falsely stating that the company performed only DOD contracts. There had never been any question that Moore accused Hoffman of falsely claiming a full exemption from ATF jurisdiction on the grounds that the company did not perform any non-DOD work at all. On appeal, however, the Eighth Circuit construed the affidavit—contrary to the evidence and Moore's own arguments—as asserting only that Hoffman claimed that the company was not performing any non-DOD work on March 20, 1992. In this manner, the Eighth Circuit converted Moore's false statement into an accurate one, leading the court to the conclusion that Moore had not lied and therefore was entitled to qualified immunity.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant this Petition.

November 13, 2001

Respectfully submitted,

Jeff H. Eckland
Counsel of Record
William L. Roberts
Mark J. Blando
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-766-7000

Attorneys for Petitioners

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-4334

Technical Ordnance, Inc.; Norman H. Hoffman,	*	
Plaintiffs - Appellees,	*	
v.	*	
United States of America; Douglas Moore, Special Agent, The Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; Other Unknown ATF Agents John Doe l, John Doe 2, John Doe 3, John Doe 4, John Doe 5, True Names Unknown,	*	Appeal from the United States District Court for the District of South Dakota.
Defendants - Appellants.	*	

Submitted: December 13, 2000
Filed: March 26, 2001

Before McMILLIAN, FAGG, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

After a jury found Technical Ordnance, Inc. (Ordnance) and Norman Hoffman, the president of Ordnance, not guilty of criminal charges growing out of their business of manufacturing and selling explosive materials, they sued the United States and several agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF). Special Agent Douglas Moore was the only identified individual defendant. The district court denied Moore's motion for summary judgment on the basis of qualified immunity, and he appeals. We reverse.

I.

Ordnance is a manufacturer and distributor of explosive devices. It exports products abroad in two different ways. The first is by export to foreign countries or foreign companies. The second is pursuant to Department of Defense (DOD) contracts. On March 20, 1992, Moore and Kim Kratochvil, an ATF regulatory compliance inspector, went to the Ordnance facility at Clear Lake, South Dakota to investigate three accidental explosions that had occurred there between January 16 and January 21, 1992. They also wished to inspect explosive bunkers and inventory for which Ordnance had received a non-compliance citation two years earlier. ATF has jurisdiction to license and regulate the importation, manufacture, distribution, and storage of explosive materials in interstate and foreign commerce. See 18 U.S.C. §§ 842 and 843. Those who operate under an ATF license must keep records and make those records and their storage facilities available for inspection. See id. at §§ 842(f) and 843(f). Ordnance has had an ATF license since 1989.

Prior to the inspection in March 1992, Hoffman had had a longstanding disagreement with ATF about its jurisdiction over Ordnance. He had told ATF agents on several occasions that his business was over regulated and that ATF should not

have jurisdiction over its activities. He also disagreed with ATF concerning the scope of its regulation.

Congress has provided that companies cannot lawfully engage in the sale of defense articles directly to foreign entities without a license from ATF and an export license from the State Department. See id. at § 842 (a); 22 U.S.C. § 2778(g)(6). ATF describes sales to foreign entities under these licenses as "commercial sales," and it has regulatory jurisdiction over this type of sale. See 18 U.S.C. § 843. ATF does not have authority, however, to regulate sales to foreign governments when they are made under contracts with the United States military, see id. at § 845(a)(6), and it describes such sales as "government to government sales." Until 1989 Ordnance had exported materials to foreign governments and related foreign businesses without an ATF license. Ordnance used its own terminology for those sales; it called them "foreign military sales" and denied that they were "commercial sales" subject to ATF regulation. In 1988 ATF informed Ordnance that these sales were "commercial" and fell within its jurisdiction, and Ordnance obtained an ATF license in 1989.

When Moore and Kratochvil went to the Clear Lake facility on March 20, 1992, they met with Hoffman and John Yuhas, the vice president of Ordnance. Hoffman objected to the inspection; he said ATF did not have jurisdiction over the Clear Lake plant. Hoffman stated that Ordnance was not "currently" engaged in what he called "foreign military sales" and was "currently" working only under DOD contracts so ATF did not have jurisdiction over the operations. Hoffman showed Moore a computer printout listing the work being done at the Clear Lake facility on that day, indicating that all of it was under DOD contract. Hoffman told the agents that records of all DOD contracts and foreign military sales were kept at the Ordnance facility in St. Bonifacius, Minnesota.

Appellees claim that Hoffman told Moore that Ordnance still did foreign military sales but that the only work that day

was under DOD contract. Moore says that he asked Hoffman why Ordnance had an ATF license if it only engaged in DOD contracts, and Hoffman replied "because they made me get one." Appellees say they felt threatened during this conversation because Moore asked Hoffman and Yuhas if they realized he wore a badge, carried a gun, and could arrest people. Eventually Hoffman discussed the causes of the explosions with the agents and allowed Kratochvil to inspect the facility, and Kratochvil determined that Ordnance had remedied the problem for which it had been cited two years previously.

Moore suspected that Ordnance was engaged in direct export to foreign governments and that Hoffman had lied when he told him that Ordnance was currently working only on projects under DOD contracts. He continued his investigation of Ordnance after the inspection on March 20. During his investigation, Moore received reports from defense contract investigators which indicated that relatively few Ordnance projects were under DOD contract. He also received a printout from the State Department indicating that, beginning in 1983 and as late as June 3, 1992, Ordnance had been making sales directly to foreign governments or companies under export licenses issued by the State Department, rather than under military contract. Such sales do not fall under the 18 U.S.C. § 845 (a)(6) exemption from ATF regulatory jurisdiction (the exemption for so-called government to government sales).

On October 19, 1992, Moore applied for a warrant to search the Clear Lake facility. His accompanying affidavit was also used by another ATF agent who attached it to his own affidavit and application for a search warrant for the St. Bonifacius facility in Minnesota where company records were located. Moore testified in his affidavit that Hoffman had told the ATF agents during the March 20, 1992 inspection that:

> because his operation currently involves only Department of Defense contracts, [] ATF has no jurisdiction and his companies [sic] activities are exempted under Title 27, CFR, Section 55.141. Hoffman stated that his company has discontinued manufacturing destructive devices and is not currently providing explosive materials to foreign customers or governments.

Appellees' Appendix at 372-73. Moore also included in his affidavit information that he had uncovered showing that Ordnance had been making sales directly to foreign governments from January 19, 1983 through June 3, 1992. He attached the State Department computer printout in support. He also supplied two other documents: an ATF report from April 17, 1990, indicating that Hoffman had told an agent that all projects at Clear Lake were under DOD contract, and a July 25, 1990 letter from John Yuhas to ATF saying that all Clear Lake projects at that time were conducted under government contracts. This evidence led Moore to believe that Hoffman had made false statements when he claimed an exemption for work being done at the Clear Lake facility and Moore concluded in his affidavit that "either no records are being maintained for the commercial transactions, . . . , or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations." Id. at 378.

The applications and Moore's affidavit were presented to two different United States magistrate judges who each found probable cause and who issued search warrants for both the Clear Lake, South Dakota and St. Bonifacius, Minnesota facilities. The warrants were executed simultaneously at both locations by ATF and DOD agents who seized a number of documents. Appellees complain that the agents only seized documents that were incriminating and bypassed or refused exculpatory documents offered by Ordnance employees.

Moore prepared a criminal case report, based in part on the seized documents. In his case report Moore listed all Ordnance commercial transactions from 1983 to 1992, the corresponding records ATF had seized under the search warrants, and an analysis of whether the records complied with ATF regulations. He forwarded the report to federal prosecutors who decided after reviewing it to seek an indictment against Ordnance and Hoffman. A federal grand jury was convened, and Moore was called to testify. He testified that during the March 20, 1992 inspection, Hoffman had "related at that point in time, they were not engaged in any commercial activity, nor were they at a given point in time engaged in any contract with foreign sales." Appellant's Brief at 10. In September 1993, the grand jury returned a multi-count indictment charging Ordnance and Hoffman with federal offenses related to licensing and record requirements, false statements, and conspiracy.[1]

After Ordnance and Hoffman were acquitted in a jury trial, they brought this action against the United States under the Federal Tort Claims Act (FTCA), see 28 U.S.C. §§ 1346, 2671 et seq.,[2] and against Moore and other unnamed ATF agents under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In their 43 page complaint appellees raised many claims, including violations of their First, Fourth, and Fifth Amendment rights, conspiracy involving Moore and unnamed agents, negligent

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[1] The indictment included charges of manufacturing and dealing explosive materials without an ATF license in violation of 18 U.S.C. § 842(a)(1) (for the period before 1989 when Ordnance engaged in direct foreign sales without an ATF license), unlawful commercial distribution of explosive materials to unauthorized persons in violation of 18 U.S.C. § 842(b), unlawful manufacture, purchase, distribution, and receipt of explosive materials without making required records in violation of 18 U.S.C. § 842(f), false statements in violation of 18 U.S.C. § 1001, and conspiracy in violation of 18 U.S.C. § 371.

[2] Under the FTCA the United States may be held liable for a tort committed by an employee acting within the scope of his office, see 28 U.S.C. § 1346(b), and such a claim is tried to the court. See id. at § 2402.

training and supervision, abuse of process, malicious prosecution, and infliction of emotional distress. They sought some $60,020,000 in damages from Moore and other unidentified ATF agents, $54,000,000 in damages from the United States, punitive damages, an injunction prohibiting the defendants from harassing, threatening, or otherwise attempting to intrude upon their constitutional rights, and attorney fees and costs.

The defendants moved to dismiss the action for failure to state a claim and Moore moved to dismiss the claims against him on the basis of qualified immunity. The district court dismissed the following claims: Fifth Amendment, abuse of process, and conspiracy by Moore. It denied dismissal for the claims of malicious prosecution and intentional infliction of emotional distress, and it denied Moore's motion for qualified immunity except on a claim that he had illegally expanded the scope of the search. The district court stated that Moore was not entitled to qualified immunity on the Fourth Amendment claim arising out of his warrant affidavit because "[a] reasonable officer would have known there was no probability or even possibility of criminal activity." (9/30/98 Order at 13). Discovery proceeded and after it was completed, Moore renewed his motion for summary judgment on the basis of qualified immunity. The motion was again denied. The district court believed there was "a genuine issue for trial" on the question of "whether or not it was objectively reasonable to assume that either no records or inadequate records existed." (10/28/99 Order at 4). The court also concluded that Moore was not entitled to qualified immunity on the First Amendment and malicious prosecution claims.

II.

To defeat a government official's claim of qualified immunity, a plaintiff must demonstrate that the official's actions violated a statutory or constitutional right, that the

right was clearly established at the time of the violation, and that a reasonable official would have known that his conduct violated that right. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Sexton v. Martin, 210 F.3d 905, 909-910 (8th Cir. 2000). Qualified immunity issues should be resolved as early as possible because one of the purposes of qualified immunity is to protect public officials from disruptive "broad-ranging discovery." See Anderson v. Creighton, 483 U.S. 635, 646-47 n.6 (1987) (quoting Harlow, 457 U.S. at 817). In some circumstances limited discovery may be required to resolve the qualified immunity question. See id. A public official is entitled to summary judgment in the absence of any genuine issue of material fact. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). In this case full discovery was permitted before the court ruled on Moore's renewed motion for summary judgment. Although appellees contend that there are genuine issues of fact that must be decided by a jury, they have not identified any *material* issues of fact preventing summary judgment. The parties do draw conflicting legal conclusions from what was said and done, and we have jurisdiction to reach the issues of qualified immunity. See Behrens v. Pelletier, 516 U.S. 299, 312-13 (1996).

A.

Moore argues first that he is entitled to qualified immunity on the claim that he subjected appellees to an illegal search and seizure in violation of their Fourth Amendment rights. Appellees claim that the Fourth Amendment law is clear and that Moore violated it by misstatements and omissions in his warrant affidavit. They also attempt to raise a malicious prosecution claim based on the Fourth Amendment, saying that he violated clearly established law of which a reasonable officer would have known when he caused them to be prosecuted without

probable cause. Moore denies that he violated any clearly established law under the Fourth Amendment.

1.

To meet the requirements of the Fourth Amendment, a search warrant must be issued by a neutral and detached magistrate on the basis of an affidavit that states probable cause for the search. See Johnson v. United States, 333 U.S. 10, 13-14 (1948). Probable cause exists if the affidavit gives a magistrate a "substantial basis for...conclud[ing] that a search would uncover evidence of wrongdoing." Illinois v. Gates, 462 U.S. 213, 236 (1983) (alterations in the original, quotation marks and citations omitted). It is not to be determined "according to a fixed and rigid formula, but rather in the light of the 'totality of the circumstances' made known to the magistrate," and a magistrate is allowed to draw reasonable inferences from the evidence presented. Massachusetts v. Upton, 466 U.S. 727, 728, 734 (1984) (per curiam).

A warrant issued on the basis of an affidavit that shows probable cause only because it contains a deliberate or reckless falsehood or omission violates the Fourth Amendment.[3] See Franks v. Delaware, 438 U.S. 154, 155-56 (1978); United States v. Humphreys, 982 F.2d 254, 258 n.2 (8th Cir. 1992). Even if a false statement or omission is included in an affidavit, the Fourth Amendment is not violated if the affidavit would still show probable cause after such falsehood or omission is redacted or corrected. See Franks,

[3] The record does not indicate whether Ordnance and Hoffman ever requested a Franks hearing during the criminal proceedings against them or sought to suppress evidence obtained under the search warrants. In order to obtain a Franks hearing, a party must first "make a substantial preliminary showing of an intentional or reckless falsehood made in the affidavit." See United States v. Wajda, 810 F.2d 754, 759 (8th Cir. 1987) (emphasis in original). This requirement is not lightly met, see id., and is not satisfied by conclusory allegations that the affiant made reckless or intentional misstatements. See Franks, 438 U.S. at 171.

438 U.S. at 171-72; Hunter v. Namanny, 219 F.3d 825, 829 (8th Cir. 2000).

The appellees claim that Moore omitted evidence he should have included, that he did not mention reports that showed that agents had examined Ordnance records twice in the past two years and concluded they complied with ATF regulations. The reports appellees cite do not indicate that ATF performed a complete inspection of all Ordnance records or that ATF found that the records accurately reported all commercial sales as required by regulations. The reports do show that Ordnance did not keep records of materials used in commercial sales separate from those for sales under government contract and that agents were therefore concerned about the difficulty of determining whether Ordnance was in compliance.[4] See Appellee's Appendix at 571, 572, 630-32. Even if Moore's affidavit were amended to show the existence of these reports, it would still show probable cause. Any such omission was therefore not material.

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[4] For example, in a report dated September 17, 1991, an ATF inspector stated:

> TEK ORD maintains computerized records for all of their operations, including the receipt, manufacture and storage of all explosive materials . . . . When taken as a whole, TEK ORD's records contain all of the information required by Part 55, but the licensee does not maintain records specifically for ATF and our inspectors encountered some difficulty in identifying and tracing those explosives which are subject to ATF regulation.... There is no segregation of explosives in storage based on intended use. Without the assistance of TEK ORD personnel the ATF Inspectors were unable to differentiate between explosives that will ultimately be used to fill DOD contracts (and therefore exempt from Part 55) and surplus explosives that will be used to fill FMS contracts. TEK ORD was therefore in
>
> the enviable position of dictating what materials, if any, are subject to ATF regulation.
>
> Appellee's Appendix at 631.

Appellees claim there was a material omission in the affidavit because Hoffman had said Ordnance records were stored at St. Bonifacius and the affidavit did not mention that town or the fact that Moore had not traveled there to make an inspection. The affidavit could not have misled a reviewing magistrate to understand that all records were at the Clear Lake facility, however, because Moore stated in the affidavit that Hoffman had said that the records were kept in Minnesota (Moore referred to the Minnesota town as Waconia, a previous site for the records). See id. at 377. Even if the exact wording now proposed by appellees would have been added by Moore, there would still have been probable cause to search the Clear Lake facility.

Probable cause requires evidence of a nexus between the object sought and the place to be searched. See United States v. Tellez, 217 F.3d 547, 550 (8th Cir. 2000). During Moore's March inspection he had seen Hoffman print out a list of work being performed on that day at Clear Lake. He knew that at least some records must therefore be available at that location and through his investigation he obtained evidence that suggested Hoffman had lied about what work was currently being done. Based on what he learned, Moore could have reasonably inferred that the St. Bonifacius records would not agree with those kept in Clear Lake or that Hoffman was lying about the location of the records, as well as about what they contained. He was not required to go to St. Bonifacius to examine the records before seeking a search warrant, for once an agent has established probable cause, he is not required to conduct a further investigation in the hope of finding exculpatory evidence. See Forman v. Richmond Police Dept., 104 F.3d 950, 962 (7th Cir. 1997). The omission of the correct name of the Minnesota records site and the fact that Moore had not himself reviewed those records was not material.

Appellees claim Moore set out Hoffman's statements in a manner designed to mislead a magistrate into believing that Hoffman had lied during the March 20 inspection. They

claim that Hoffman told Moore that the company had no foreign contracts on the day of the inspection but that it engaged in both DOD contracts and foreign military sales. Moore never stated in his affidavit that Hoffman claimed that Ordnance only performed DOD contracts. The affidavit indicates that Moore understood Hoffman to say that Ordnance was not engaged in direct sales to foreign governments on that day. Appellees find it significant that on pages 2 and 3 of his affidavit Moore repeated Hoffman's statement that Ordnance was not "currently" making direct sales to foreign governments, but that he did not include that word in the summary section. See Motions Hearing Transcript 3/19/97 at 23. Counsel argued that this was misleading because the summary is "probably the only section that anyone read." Id. This argument is sheer speculation. The affidavit was only eight pages, and there is no evidence or reason to believe that either magistrate did not consider the whole affidavit, as required under the law. See United States v. Anderson, 933 F.2d 612, 614 (8th Cir. 1991) (warrant affidavits are to be read "as a whole"). The fact that the word "currently" was not repeated in the summary does not show an intentional or reckless omission. It would be a rare summary that included all that went before.

If the affidavit were amended with the language appellees suggest, to say that "Hoffman and Yuhas had acknowledged that Technical Ordnance engaged in 'foreign military sales' over which they disputed ATF's jurisdiction [and] that no work on such sales was in progress at the Clear Lake plant on March 20, 1992," Appellee's Brief at 53, the affidavit would still have contained probable cause that officers of the company had lied and were not keeping records required by ATF regulation. The affidavit would still have shown that Yuhas and Hoffman stated that on three particular days (April 17 and July 25, 1990 and March 20, 1992) the Clear Lake plant was working only on United States military projects and was exempt from ATF regulation

when other information contradicted the assertions. Moore pointed out that defense contract investigators had told him that Ordnance had few DOD contracts around March 20, 1992, and documents from the State Department showed that the Clear Lake facility had contracts directly with foreign governments from January 19, 1983 through June 3, 1992, totaling over $11,000,000.

The affidavit contains other facts that would cause a reasonable law enforcement agent to be suspicious. Between January 16 and January 21, 1992, three explosions had occurred at the Clear Lake facility, but none were reported to ATF. When asked about them, Hoffman acknowledged they had occurred, but he claimed that he was not required to report them since only exempt DOD contracts were being worked on at that time. During the March 20 inspection, Hoffman initially denied ATF access to an explosives bunker because it was marked with a DOD sticker. Moore learned later from a defense contract investigator that Ordnance had not been working on any classified DOD projects on March 20. Another investigator informed Moore that "during her last compliance inspection . . . she found the company in total noncompliance, because she found the inventory and accountability so confusing she found it impossible to sort out the situation." Appellee's Appendix at 373-74.

The appellees attempt to parse Moore's affidavit, looking at individual parts in isolation. A warrant affidavit is properly viewed as a whole, and the reviewing magistrate is to examine its totality. See Gates, 462 U.S. at 230-31; Anderson, 933 F.2d at 614 ("the affidavit cannot be attacked paragraph by paragraph; it must be evaluated as a whole"). It "should be read with common sense and not in a grudging, hyper technical fashion." Walden v. Carmack, 156 F.3d 861, 870 (8th Cir. 1998). A law enforcement official is not required to include everything he knows about a subject in his affidavit, whether it is material to a finding of probable cause or not. See United States v. Ramirez, 279 F.2d 712, 716 (2d Cir. 1960). The warrant contained evidence that Ordnance

claimed exemptions on six nonconsecutive days during a time period in which it was engaged in a significant number of direct foreign sales which are under ATF jurisdiction. Investigators had found Ordnance's recordkeeping confusing and non-compliant, and in at least one instance an Ordnance officer lied to agents when he claimed that a bunker contained classified DOD materials.

ATF is granted broad authority to enter the premises of a regulated explosives manufacturer to inspect its records and storage facilities. Its jurisdiction did not hinge on whether Ordnance was performing foreign military sales on the day of the inspection. See 18 U.S.C. § 843(f) ("The Secretary may enter during business hours the premises . . . of any licensee or permittee, for the purpose of inspecting or examining (1) any records or documents required to be kept by such licensee or permittee, . . . and (2) any explosive materials kept or stored by such licensee or permittee at such premises."); see also 27 C.F.R. § 55.24. Given all the evidence in the affidavit, it was not unreasonable for Moore to infer that Hoffman had lied in claiming exemptions on days ATF was investigating.

Appellees have not shown any genuine issue of material fact as to whether Moore intentionally or recklessly made misstatements or omissions in his affidavit. Imprecision in the affidavit may show that Moore was careless in drafting some of the language, but careless error does not show reckless or intentional misconduct. Neither does the fact that Moore may have used somewhat different language in recounting Hoffman's statements in his grand jury testimony than in his affidavit.[5] The Fourth Amendment requires that a

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[5] Appellees argue that there is a material question of fact about whether Hoffman told the agents that Ordnance was not "currently" engaged in direct foreign sales, as Moore stated in his affidavit, or whether Hoffman used the phrase "at that time," as Moore testified to the grand jury. To defeat summary judgment, appellees must show there is a genuine dispute over facts that could affect the outcome of the lawsuit. See Webb v. Lawrence County, 144 F.3d 1131, 1135 (8th Cir. 1998). The word "currently" has essentially the same meaning as the phrase "at that

warrant affidavit be a "truthful factual showing of probable cause – truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Mueller v. Tinkham, 162 F.3d 999, 1003 (8th Cir. 1998) (quotation marks and citations omitted). Moore did not attempt to search Ordnance facilities without a warrant, nor did he rush to apply for a warrant. He began an investigation when his suspicions were aroused as a result of the March 20 Clear Lake visit. After some seven months, he applied for a warrant and summarized in his affidavit what he had learned from speaking to a number of agents and from gathering records. Appellees have not shown that Moore did not believe what he put in the affidavit or that probable cause only existed because of intentional or reckless falsehoods or omissions in his affidavit. Moore is entitled to qualified immunity on this claim.

2.

Moore asserts that he is also entitled to qualified immunity on the malicious prosecution claim because appellees have not alleged that he infringed a constitutional right. The general rule is that an action for malicious prosecution does not state a claim of constitutional injury. See Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000). Appellees may overcome Moore's assertion of qualified immunity only if they show that the acts on which they base their malicious prosecution claim also violate a constitutional provision or federal law. See Sanders v. Sears, Roebuck & Co., 984 F.2d 972, 977 (8th Cir. 1993).

The district court concluded that appellees' malicious prosecution claim alleged a violation of a clearly established constitutional right under the Fourth Amendment.[6]

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time." See WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 340 (3d ed. 1988) (defining "current," in part, as "at the present time").

[6] The district court dismissed appellees' attempt to raise their malicious prosecution claim under the Fifth Amendment, stating "a claim

Appellees allege that they were forced to post bond, summoned to appear before court, and made to answer charges although prosecuted without probable cause. They contend that such malicious prosecution amounted to an illegal seizure under the Fourth Amendment, citing Albright v. Oliver, 510 U.S. 266, 276-81 (1994).[7] In that case, Albright had brought a substantive due process claim charging malicious prosecution by the detective who had initiated criminal proceedings against him. The Court held that Albright had not stated a claim, but suggested that he might have been able to raise a claim of improper arrest under the Fourth Amendment. See id. at 274-75 (plurality opinion); id. at 281 (Kennedy, J., concurring); id. at 288-89 (Souter, J., concurring in the judgment). Justice Ginsburg suggested in dictum in her concurrence that pretrial deprivations of liberty, such as the requirement to post bond, to attend court proceedings, and limitations on travel might amount to a seizure, implicating the Fourth Amendment. See id. at 276-81. The two dissenting Justices seemed to agree. See id. at 307 (Stevens, J. and Blackmun, J., dissenting).

This circuit has never held that pretrial restrictions such as those alleged by appellees constitute a Fourth Amendment seizure. Appellees argue that the Third Circuit recognized this theory in Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998). They also cite to dicta in Murphy v. Lynn, 118 F.3d 938 (2nd Cir. 1997), cert. denied, 522 U.S. 1115 (1998)

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for malicious prosecution, if it exists, must fall under the Fourth Amendment...Plaintiff's Fifth Amendment claims must fail....Plaintiffs' Fifth Amendments...claims against defendants Moore and the United States are dismissed." (4/14/97 Order at 10, 13). The appellees have not now attempted to appeal that ruling. Although they cite a list of procedural due process cases, they have not pointed to specific authority which shows the district court erred.

[7] They also rely on Gerstein v. Pugh, 420 U.S. 103, 111 (1975), which held that an arrestee may be subjected to extended detention only after a judicial determination of probable cause. Appellees were never jailed, and Gerstein does not support their Fourth Amendment theory in this case.

(obligation to appear in court and curtailment of travel could constitute a seizure). But see Britton v. Maloney, 196 F.3d 24, 28-30 (1st Cir. 1999), cert. denied, 120 S.Ct. 2198 (2000). We cannot say that the Albright dictum amounts to a statement of clearly established law. Moreover, since Moore's conduct took place prior to the 1994 decision in Albright, it could not have violated any clearly established constitutional right. Moore is entitled to qualified immunity on this claim.

B.

Moore argues that he is also entitled to qualified immunity on the claim that he violated appellees' First Amendment rights by initiating criminal proceedings against them. Appellees claim his actions were in retaliation for their belief that ATF should not have jurisdiction over their business. The district court denied qualified immunity to Moore on this claim with the comment that "defendants' actions had effectively silenced plaintiffs, depriving them of their right to freedom of speech and expression." (4/14/97 Order at 11).

Prosecution in retaliation for the exercise of the right to protest government policy is an impermissible intrusion upon First Amendment rights, United States v. Catlett, 584 F.2d 864, 867 (8th Cir. 1978), but appellees cannot proceed without a showing that Moore acted with an improper motive when he took steps that led to the prosecution against them. See Crawford-El v. Britton, 523 U.S. 574, 600 (1998). Moore asserts that appellees have not made such a showing.

To overcome Moore's defense of qualified immunity, appellees must show that a material fact or question of law precludes summary judgment. See Yellow Horse v. Pennington County, 225 F.3d 923, 927 (8th Cir. 2000). Because Moore's motive is at issue, "the plaintiff[s] may not respond simply with general attacks upon [Moore's] credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff[s have] carried

[their] burden of proving the pertinent motive." Crawford-El, 523 U.S. at 600. Appellees allege that during the March 20, 1992 inspection, Moore told Hoffman and Yuhas that he wore a badge, carried a gun, and could arrest people; that Ordnance received a threatening phone call from an unidentified man after service of the complaint saying "be real careful of what you ship"; that Moore believed that Hoffman would object publicly to the ATF searches; that the searches were simultaneous, unannounced, and involved 21 federal agents; and that only documents that made it appear that Ordnance was involved in improper activities were seized. Even taking all of appellees' allegations as true, and drawing all reasonable inferences in the light most favorable to them, they do not show that Moore was motivated by animus against them for their positions on governmental regulation. We do not question that appellees themselves hold a sincere belief that ATF targeted them because of their opinion that they should be free of its regulation, but they have not made the requisite showing that Moore's conduct was the result of an improper motive or in retaliation for their beliefs in violation of the First Amendment. Moore is entitled to qualified immunity on this claim.

III.

After considering the full record and the arguments the parties raise on all of the various theories asserted in the Bivens action against Moore, we conclude that appellees have not made a showing that Moore violated any clearly established constitutional right and that as a matter of law he is entitled to qualified immunity. The order denying Moore's motion for summary judgment is reversed, and the case is remanded for resolution of the remaining claims against the United States.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

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violated the Fourth and Fifth Amendments to the United States Constitution and plaintiffs' right to privacy by conducting an unreasonable search and seizure in connection with the investigation of those criminal charges. Count II, which is limited to the unknown agents, also alleges they failed to properly train and supervise the Special Agents. Count III claims a cause of action under the Federal Tort Claims Act for malicious prosecution. Count IV alleges a cause of action under the Federal Tort Claims Act for abuse of process. Count V alleges a cause of action under the Federal Tort Claims Act for infliction of emotional distress upon plaintiff Hoffman.

Defendants United States and Agent Moore moved to dismiss for failure to state a claim under the Fourth and Fifth Amendments and on the basis of qualified immunity, Doc. 9. While that motion was pending, plaintiffs filed an amended complaint. Counts I, II, and III of the amended complaint allege violations of plaintiffs' First, Fourth, and Fifth Amendment rights. Count IV alleges a conspiracy to deprive plaintiffs of their civil rights in violation of 42 U.S.C. § 1985. Count V alleges a claim under the Federal Tort Claims Act for malicious prosecution. Count VI alleges a claim under the Federal Tort Claims Act for abuse of process. Count VII alleges a claim under the Federal Tort Claims Act for infliction of emotional distress upon plaintiff Hoffman. Count VIII seeks an injunction against the defendants to prohibit the continuance of an alleged policy to "disrupt, intimidate, harass, threaten, entrap, and otherwise attempt to injure plaintiffs in violation of their rights to freedom of speech and expression . . . and in violation of their rights to be secure in their liberty and property ...."

The United States and Agent Moore filed a renewed motion to dismiss the complaint and amended complaint, Doc. 15. Following completion of briefing, plaintiffs, without leave of court and in violation of local rule, filed a supplemental memorandum. Defendants filed a motion to strike this supplemental memorandum, Doc. 22. Also before

the Court is the plaintiffs' motion to toll the statute of limitations with respect to the unknown defendants, Doc. 13.

INTRODUCTION

The district court must accept the allegations of the amended complaint as true when considering a Rule 12(b) motion to dismiss. Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996). Dismissal under Rule 12(b)(6) is appropriate only when it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Dover Elevator Co. v. Arkansas State University, 64 F.3d 442, 445 (8th Cir. 1995).

In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 91 S. Ct. 1999, 2002-03 29 L. Ed. 2d 619 (1971), the United States Supreme Court held that civil damages suits could be maintained against federal officials for constitutional violations. A Bivens action against federal officials is almost identical to an action under 42 U.S.C. § 1983 against state officials. Christian v. Crawford, 907 F.2d 808, 810 (8th Cir. 1990). The two claims involve the same analysis and therefore cases involving § 1983 are persuasive in the Bivens context. See Waddell v. Forney, __ F.3d __ n. 2, 1997 W.L. 1029287 (8th Cir. 1997).

1. FOURTH AMENDMENT CLAIM

Defendants Moore and the United States argue that plaintiff Hoffman has no standing to assert a Fourth Amendment claim based upon a search of Technical Ordnance's facilities. The searches which are the subject of the amended complaint were conducted at Technical Ordnance's facilities in St. Bonifacius, Minnesota, and Clear Lake, South Dakota. The amended complaint avers that Hoffman is president of Technical Ordnance. Hoffman owns the buildings and facilities which were searched and leases them to Technical Ordnance. Both plaintiffs have standing to

assert a Fourth Amendment claim based upon their ownership and control of the premises. United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994).

The Fourth Amendment to the United States Constitution provides, in part, that "no Warrant shall issue, but upon probable cause supported by Oath or affirmation...." The Warrant Clause rests on the premise that there will be a truthfulshowing. Franks v. Delaware, 438 U.S. 154, 164-165 (1978). "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." Franks v. Delaware, 438 U.S. at 171. In Franks v. Delaware, petitioner sought to challenge, in connection with his motion to suppress evidence prior to his rape trial, the truthfulness of certain factual statements in the affidavit supporting the search warrant for his apartment. The United States Supreme Court held:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient

> content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

Franks v. Delaware, 438 U.S. at 171-172. This language was recited in the context of the issue as to whether a criminal defendantmay challenge the veracity of a sworn statement made in an affidavit supporting the warrant; it thus set forth the standard for obtaining an evidentiary hearing. Franks v. Delaware, 438 U.S. at 155. The Franks standard "also defines the scope of qualified immunity in civil rights actions." Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991) (Branch I) (quoting Rivera v. United States, 928 F.2d 592, 604 (2nd Cir. 1991)). The Franks standard of pleading applies to the issue of qualified immunity in a civil Bivens action and in civil rights actions. Hervey v. Estes, 65 F.3d 784, 788 (9th Cir. 1995).

The United States Court of Appeals for the Eighth Circuit has held that, in a civil case, "a substantial preliminary showing of dishonesty is necessary to obtain even an evidentiary hearing in an attempt to impeach a warrant application which on its face reveals probable cause." Myers v. Morris, 810 F.2d 1447, 1457 (8th Cir. 1987). "Mere unfounded and unsupported allegations that the warrant was not based on probable cause, but rather upon false statements, and deception are not sufficient to subject officials to the cost and burdens of trial." Id., quoting Fullman v. Graddick, 739 F.2d 553, 562 (11th Cir. 1984).

Branch I articulated a heightened pleading standard which requires plaintiffs to satisfy three requirements:

> "[P]laintiff's complaint must contain nonconclusory allegations that the defendant knowingly included false statements in the affidavit or did so with reckless disregard. That is, he must

[1]. "point out specifically the portion of the warrant affidavit that is claimed to be false" and

[2]. allege some facts tending to show that the defendant was aware or should have been aware of the falsity of those statements [and]...

[3]. allege that the false statements were "necessary to the finding of probable cause."

Branch I, 928 F.2d at 1387 (citations omitted); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (Branch II).

Although plaintiffs must meet a heightened pleading standard on their Fourth Amendment claim, the standard is a low one. Branch I, 937 F.2d at 1387.

> [The standard] serves the limited purpose of enabling the district court to dismiss "insubstantial" suits prior to discovery and allowing the defendant to prepare an appropriate response. It should be distinguished from the standard at summary judgment, where a plaintiff alleging judicial deception "must make a substantial showing of deliberate falsehood or reckless disregard for truth" and "establish that, but for the dishonesty, the challenged action would not have occurred."

Branch I, 937 F.2d at 1287-1388, quoting Snell v. Tunnell, 920 F.2d 673, 698 (10th Cir. 1990).

Plaintiffs have clearly met the Branch I heightened pleading standard to survive a motion to dismiss. The complaint and the amended complaint both set forth that particular statements in the affidavit in support of the search warrant were allegedly "knowingly and/or intentionally false" and demonstrated the facts upon which they rely to show Agent Moore knew the affidavits were false. Plaintiffs

further allege these false statements were necessary to procure a judicial finding of probable cause to obtain a search warrant.

"Government officials performing discretionary functions are generally shielded from liability for civil damages unless their conduct violates 'clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.'" George v. City of St. Louis, 26 F.3d 55, 57 (8th Cir. 1994), quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). An official is entitled to qualified immunity if the court determines the "official's action was objectively legally reasonable in light of the legal rules that were clearly established at the time the action occurred." George v. City of St. Louis, 26 F.3d at 57. "In the context of a police officer obtaining a warrant, immunity will be lost only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." Id. "If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements . . . he cannot be said to have acted in an objectively reasonable manner." Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991), quoting Olson v. Tyler, 771 F.3d 277, 281 (7th Cir. 1985).

There is no question that the law in this regard is clearly established. George v. City of St. Louis, 26 F.3d at 57. In George, the issue before the Court was whether the defendants' actions in relying upon information from a confidential informant to support a warrant application were "objectively legally reasonable under the standard established in [Malley v. Briggs, 475 U.S. 335, 344-345, 106 S. Ct. 3034, 3038, 97 L. Ed.2d 271 (1986) ("In the context of a police officer obtaining a warrant, immunity will be lost only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence

unreasonable.")]." George v. City of Louis, 26 F.3d at 57. Here, defendants do not contend at this stage that the statements in the warrant application were objectively reasonable but instead jump to the heart of Franks and contend that notwithstanding the challenged statements, the remaining allegations are sufficient to establish probable cause.

The United States Court of Appeals for the Eighth Circuit has held that "qualified immunity is an affirmative defense, "which will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." Hafley v. Lohman, 90 F.3d at 266 (quoting Weaver v. Clarke, 45 F.3d 1253, 1255 (8th Cir. 1995)). The evidence must be viewed in a light most favorable to the nonmoving party. George v. City of St. Louis, 26 F.2d at 57. The court is not required to treat a motion to dismiss as a motion for summary judgment when it considers an exhibit introduced as part of the motion attacking the complaint where that exhibit is referred to in the plaintiffs' complaint. Sheppard v. Texas Department of Transportation, 158 F.R.D. 592, 595 (E.D. Tex. 1994). "When plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading." Vizenor v. Babbitt, 927 F. Supp. 1193, 1198 (D. Min. 1996). However, the exhibit must not only be referred to by the complaint, "it must be integral and central to the plaintiff[s'] claim." Sheppard v. Texas Department of Transportation, 158 F.R.D. at 596. The basis of plaintiffs' claims is that search warrants were illegally obtained which resulted in a criminal prosecution, both of which violated plaintiffs' federal and state law rights. The amended complaint quotes portions of the search warrants in support of plaintiffs' claims. Defendants attached copies of the search warrants and probable cause affidavits to their brief in support of their motion to dismiss. These matters are properly considered in determining whether plaintiffs' complaint states a claim upon which relief may be granted

and whether defendant Moore is entitled to qualified immunity.

The affidavit plaintiffs complain about was made by ATF Special Agent Douglas C. Moore on October 19, 1992, in support of a search warrant for the Clear Lake, South Dakota, facility. The amended complaint does not make any reference to the affidavit by Special Agent David Gottschalk in support of a search warrant at the St. Bonifacius, Minnesota, facility.

The affidavit alleges that plaintiffs were in violation of 18 U.S.C. § 1001 (which, in the context of this case, makes it a crime, in any matter within the jurisdiction of the executive branch of the United States government, to knowingly and willfully falsify, conceal or cover up by any trick, scheme, or device a material fact, or make any false, fictitious or fraudulent statements or representations) and states that Hoffman and Yuhas (a company employee) "stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman states that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping." The amended complaint claims that these statements in the affidavit were intentionally made falsely and that defendants admitted at plaintiffs' criminal trial that plaintiffs did tell defendants that Technical Ordnance was involved in foreign military sales.

The clear implication of page three of the affidavit is that Hoffman had falsely portrayed matters and that Hoffman was claiming that his entire operation fell under the purview of the DOD exemption.

The affidavit also alleges that plaintiffs were in violation of 18 U.S.C. § 842(f) (referring to a licensee or permittee who manufactures, imports, purchases, distributes, or receives explosive materials which licensee or permittee fails to make records) and states that "[o]n April 17, 1990, during an ATF Compliance Inspection of Technical Ordnance, Inc. Clear

Lake...Hoffman and...Yuhas stated that all activities at the Clear Lake facility were related to U.S. Department of Defense government contracts and therefore exempt from ATF regulation." The amended complaint claims this statement, as well as three other statements made in the affidavit in support of the claimed § 842(f) violation, were false and that defendants admitted at plaintiffs' criminal trial that plaintiffs did tell defendants that Technical Ordnance was involved in foreign military sales.

Plaintiffs have met the heightened pleading standard set forth in Franks. The Moore affidavit contains eight typewritten pages of substantive statements. If the Court were to delete from the affidavit each statement which the plaintiffs claim is false and add to it the exculpatory information plaintiffs claim was known by Agent Moore but wrongly omitted, it is not clear that "there remains sufficient content in the warrant affidavit to support a finding of probable cause." Franks, supra. Defendant Moore's qualified immunity defense is not sufficiently established at this juncture.

Plaintiffs also claim that defendants suppressed exculpatory evidence and that defendants' actions amounted to malicious prosecution in violation of plaintiffs' Fourth Amendment rights. The Supreme Court in Albright v. Oliver, infra, held that a malicious prosecution claim, if it exists at all, is based upon the Fourth Amendment. The Supreme Court did point out that "there is an embarrassing diversity of judicial opinion" on the "extent to which a claim of malicious prosecution is actionable under § 1983." Albright v. Oliver, 510 U.S. 266, 271, n. 4, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114 (1994). Neither party has cited an Eighth Circuit opinion on the availability of a Bivens action under this theory.

The United States Court of Appeals for the Second Circuit held that "[t]he Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person--i.e., the right to be free of

unreasonable or unwarranted restraints on personal liberty." Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2nd Cir. 1995). "A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of 'seizure.'" Id; Whiting v. Taylor, 85 F.3d 581, 584 (11th Cir. 1996). "In respect of pleading, Albright requires nothing more." Singer v. Fulton County Sheriff, 63 F.3d at 116. Plaintiffs' amended complaint satisfies this requirement. Defendant Moore has not presented a sufficient claim for qualified immunity as it relates to allegations concerning his conduct after execution of the search warrants.

Plaintiffs claim the ATF unlawfully expanded the search to items not described in the affidavits. Generally, when a search is conducted pursuant to a warrant, only those items described in the warrant may be seized. United States v. Robbins, 21 F.3d 297, 300 (8th Cir. 1994). The amended complaint alleges that the ATF agents searched record-keeping files which did not contain any evidence of illegal activity and which were not the type of records targeted by the search warrant. The search warrants allowed the search of:

> Books, records, receipts, invoices, notes, contracts, ledgers and other papers relating to the transportation, ordering, purchasing, sale, transfer, export, and manufacture of explosive materials, explosive devices, explosive activated tools or devices and military explosive devices, detonators, fuses, etc."

Plaintiffs allege the search was unlawfully expanded in that the following items were seized:

> (i) Transactions that occurred prior to the time that Technical Ordnance acquired its ATF license in

1989, for which all applicable statutes of limitation had expired;
(ii) Transactions that involved third-party brokers or other entities that did not themselves have an ATF license; and
(iii) Transactions that involved incomplete records or records containing typographical errors.

None of the above items are, on their face, outside the scope of the language of the warrants. A reasonable officer could have believed that the search as conducted was authorized by the warrants and therefore defendant Moore is entitled to qualified immunity on this claim.

2. FIFTH AMENDMENT CLAIMS

Plaintiffs claim generally that all the actions set forth in their complaint violate their Fifth Amendment rights. The allegations with respect to search and seizure must be maintained under the Fourth Amendment and not the more general Fifth Amendment. Albright v. Oliver, 510 U.S. 266, 274, 114 S. Ct. 807, 813, 127 L. Ed. 2d 114 (1994). Plaintiffs claim the allegations of malicious prosecution and suppression of exculpatory evidence violate their Fifth Amendment Rights. They cite cases which have held that entrapment, suppression of evidence and other outrageous conduct violates the Fifth Amendment's substantive due process protection. However, those cases concern the consequences of those actions in the context of a criminal prosecution and do not provide the basis for a civil action.

Not every infringement of an interest protected at common law rises to a deprivation of a constitutionally protected liberty interest. Albright v. Oliver, 975 F.2d 343, 346 (7th Cir. 1992), aff'd 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d (1994). "Being the object of a criminal investigation, whether rightly or wrongly, is just one of the burdens to which every citizen is exposed." Kaylor v. Fields, 661 F.2d

1177, 1181 (8th Cir. 1981). The United States Supreme Court held in Albright v. Oliver that a claim for malicious prosecution, if it exists, must fall under the Fourth Amendment. Albright v. Oliver, 510 U.S. at 266, 114 S. Ct. at 807. Plaintiffs' Fifth Amendment claims must fail.

3. FIRST AMENDMENT CLAIMS

Plaintiffs claim that the wrongful conduct described in their complaint was perpetrated against them because of their political or philosophical beliefs and was therefore in violation of their first amendment rights. The United States Court of Appeals for the Ninth Circuit has held that the victim of governmental action "designed to retaliate against and chill political expression" is entitled to sue the responsible officers. Mendocino Environmental Center v. Mendocino County, 14 F.3d 457, 464 (9th Cir. 1994).

> A plaintiff "may not recover merely on the basis of a speculative 'chill' due to generalized and legitimate law enforcement initiatives." However, where a plaintiff "alleges discrete acts of police surveillance and intimidation directed solely at silencing" her or him, a civil rights claim will lie. The defendant's intent is an element of the claim.

Mendocino, 14 F.3d at 464 (quoting Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986). The heightened standard of Branch II applies with respect to the allegations of intent, id., requiring plaintiffs to "state in their complaint nonconclusory allegations setting forth evidence of unlawful intent." Mendocino, 14 F.3d at 461.

Plaintiffs allege in the amended complaint that their philosophical view that private enterprises are unduly burdened with excessive and duplicative regulation by multiple government agencies with no apparent jurisdiction over the activities of plaintiff Technical Ordnance was a

substantial factor leading up to the "intimidation, harassment, indictments, and seizures of the persons of plaintiffs," and that defendants' actions effectively silenced plaintiffs, depriving them of their right to freedom of speech and expression. Plaintiffs have met the burden of pleading their First Amendment claim as required by Mendocino.

4. CONSPIRACY

Plaintiffs claim defendants conspired to deprive them of "the equal protection of the laws, their clearly established Constitutional rights to be free to express themselves, to be free from unreasonable seizures of their persons and to be free from denial of liberty and property without due process of law as guaranteed by the First, Fourth and Fifth Amendments, and to deny them of their rights to a fair trial by jury under the Sixth Amendment to the United States Constitution." Plaintiffs claim defendants therefore violated 42 U.S.C. § 1985. In order to state a cause of action under 42 U.S.C. § 1985, plaintiffs "must allege some class-based discriminatory motive on the part of the conspirators." Kaylor v. Fields, 661 F.2d at 1184. Plaintiffs have failed to so allege and this claim must therefore be dismissed.

5. FEDERAL TORT CLAIMS: MALICIOUS PROSECUTION, ABUSE OF PROCESS, INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs allege common law tort actions which they seek to bring under the Federal Tort Claims Act. "Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant." Donham v. United State, 536 F.2d 756, 769 (8th Cir. 1976).

In order to sustain an action under South Dakota law for malicious prosecution, plaintiffs must allege:

1. the commencement or continuance of an original criminal or civil judicial proceeding;
2. its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;
3. its bona fide termination in favor of the present plaintiff;
4. the absence of probable cause for such proceeding;
5. the presence of malice; and
6. damages conforming to legal standards resulting to plaintiff.

Meissner v. All Dakota Ins. Assoc., Inc., 515 N.W.2d 198, 200 (S.D. 1994). Plaintiffs have sufficiently alleged each of these elements in their amended complaint. Defendant Moore has not asserted he is entitled to absolute prosecutorial immunity. He is not shielded by qualified immunity as to this claim on the record before the Court.

In order to sustain an action under South Dakota law for abuse of process, the plaintiffs must allege the improper use of process after it has been issued. Meissner v. All Dakota Inc. Assoc., Inc., 515 N.W.2d at 205. Plaintiffs' amended complaint contains allegations that defendant Moore procured indictments against plaintiffs in bad faith and for a purpose of harassing, retaliating, and interfering with plaintiffs' First Amendment and other rights. However, there is no allegation that once indictments were procured, the criminal prosecutions were pursued for some purpose other than for which they were intended.

> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance.

Meissner v. All Dakota Inc. Assoc., Inc., 515 N.W.2d at 205, quoting Keeton, Prosser and Keeton on the Law of Torts § 121, at 897. Plaintiffs have failed to state a claim for abuse of process.

In order to sustain an action under South Dakota law for infliction of emotional distress, plaintiff Hoffman must allege:

1. an act by defendant amounting to extreme and outrageous conduct;
2. intent on the part of the defendant to cause plaintiff severe emotional distress (intentional infliction of emotional distress) or reckless conduct which constitutes a deliberate disregard of a high degree of probability that emotional distress will follow (negligent infliction of emotional distress;
3. the defendant's conduct was the cause in fact of plaintiff's injuries; and
4. the plaintiff suffered an extreme disabling emotional response to defendant's conduct.

Nelson v. Web Water Dev. Assoc., Inc., 507 N.W.2d 691, 698 (S.D. 1993); Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 428-429 (S.D. 1994). Hoffman alleges in the amended complaint that defendants intentionally and with malice engaged in outrageous conduct which caused him to suffer extreme emotional distress and physical illness. The amended complaint is marginally sufficient, giving plaintiff Hoffman the benefit of all reasonable inferences.

6. TOLLING THE STATUTE OF LIMITATIONS

Plaintiffs, in ¶ 5 of their amended complaint, Doc. 13, seek an order tolling all applicable statutes of limitation as to the unknown defendants. Plaintiffs have failed, in violation of local rule, to cite any authority in support of this motion. Whether an amendment of a pleading relates back to the date of the original pleading is governed by Fed. R. Civ. P. 15(c).

This matter is more properly considered at the time, if any, that a motion to add parties or to amend is filed. The motion is premature, would call for an advisory opinion and should be denied.

ORDER

Now, therefore,

IT IS ORDERED:

(1) Defendants' motion to dismiss, Doc. 9, and renewed motion to dismiss, Doc. 15, are granted in part. Plaintiffs' Fifth Amendment, Conspiracy, and abuse of process claims against defendants Moore and the United States are dismissed. Defendants are entitled to qualified immunity on plaintiffs' Fourth Amendment claim that the search was unlawfully expanded beyond the warrant.

(2) Defendants' motion to strike, Doc. 22, is granted.

(3) Plaintiffs' motion to toll the statute of limitations, Doc. 13, is denied.

Dated this 14th day of April, 1997.

BY THE COURT:

/s/
CHARLES B. KORNMANN
U.S. District Judge

ATTEST:
JOSEPH HAAS, Clerk

BY: s/ Vicky Leinhaul
DEPUTY
(Seal)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

TECHNICAL ORDNANCE, INC. and NORMAN H. HOFFMAN,	*	CIV 95-1039
Plaintiffs,	*	
-vs-	*	ORDER
UNITED STATES OF AMERICA; DOUGLAS MOORE, Special Agent, The Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; and OTHER UNKNOWN ATF AGENTS JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, True Names Unknown,	*	
Defendants.	*	

Defendant Moore ("Moore") has moved the Court, purportedly pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to reconsider the Order (Doc. # 28) dated April 14, 1997. The Court will decide the motion without further oral argument.

Moore claims the Court erred in failing to rule as to whether his search warrant affidavit, excluding the alleged deliberate falsehoods, would still have supported a finding of probable cause, thus granting him qualified immunity. He represents to the Court that this is the law in the Eighth

Circuit, namely that this examination should be conducted in a deliberate falsehood case, and cites Bagby v. Brondhaver, 98 F.3d 1096 (8th Cir. 1996). This is a clear misrepresentation and counsel for Moore should submit an explanation in writing to the Court as to this. Bagby "does not involve a deliberate falsehood claim." Id. at 1099. No one could misread or misinterpret the concise language of the Bagby opinion. "We express no view as to whether a defendant whose affidavit contained a deliberate falsehood should be entitled to qualified immunity if a corrected affidavit would still provide probable cause. A more stringent rule may be appropriate when a liar seeks the benefit of this defense." Id. at 1099, n.2. Not only does Bagby not stand for the proposition claimed by Moore; it stands for the opposite, at least by implication. This Court does express the view and so holds that an affidavit containing deliberate falsehoods is not entitled to qualified immunity. A more stringent rule is appropriate when a claimed liar seeks the benefit of this defense. This is especially appropriate when the falsehoods are alleged to be material. As claimed in this case, they are material.

Counsel for Moore continue to appear not to understand the differences and the implications thereof when considering a motion attacking a complaint as distinguished from a motion for summary judgment.

Moore claims on page 7 of his memorandum that the Court refused to dismiss the malicious prosecution claim based on the Fourth Amendment, claiming that the Court erroneously relied upon a 1995 decision, Singer v. Fulton County Sheriff, 63 F. 3d 110 (2nd Cir. 1995), a case that was decided a short time before the Technical Ordnance trial began. Moore argues that it was not earlier objectively unreasonable to make intentionally false statements to obtain a search warrant. This is an argument devoid of any merit. Many cases are cited in the earlier Order to the effect that the law was clearly established long before Moore's actions. Important liberty interests are implicated by the alleged

actions of Moore. Again, we are dealing with allegations in a pleading and nothing more. The law in South Dakota was clearly established as to what the implications are as to malicious prosecution. The primary discussion of the malicious prosecution cause of action is found at pages 11 and 12 of the Court's earlier Order, this claim arising under the Federal Tort Claims Act. The absence of probable cause is one of the elements which must be established by the plaintiffs in connection with such cause of action. In that sense, the Fourth Amendment tests would be applicable. Moore makes much ado about little since plaintiffs clearly state a cause of action for malicious prosecution, whether under the Fourth Amendment or the Federal Tort Claims Act applying South Dakota law.

Moore alleges that the allegations in the complaint are conclusory. They are anything but conclusory.

In addition to denying the motion on the merits, the Court will deny the motion to reconsider because it is procedurally improper. The Federal Rules of Civil Procedure do not allow a "motion to reconsider." Humphreys v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1081 (8th Cir. 1993); and In re Trout, 984 F.2d 977, 978 (8th Cir. 1993) (warning counsel that the Federal Rules of Civil Procedure do not provide for a motion for reconsideration and directing counsel to properly designate a motion under the rule authorizing the motion). It is clear that Moore has failed to follow existing law in this Circuit.

Counsel for Moore designated the motion as being made pursuant to Fed. R. Civ. P. 59(e). In his brief, Moore does not explain how this rule would allow the Court to grant the relief that Moore seeks in his motion. A trial was not conducted in this case and, therefore, Rule 59(e) is not applicable to this case. Reconsideration of a judgment following its entry "is an extraordinary remedy which should be used sparingly." 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1, at 124 (1995). A motion pursuant to Rule 59(e) may be granted upon four

basic grounds: (1) to correct manifest errors of law or fact, (2) newly discovered evidence, (3) to prevent manifest injustice, and (4) an intervening change in controlling law. Id. at 124-27. In addition, a motion made pursuant to Rule 59(e) is not to be used to relitigate matters already considered and decided by the court. Id. at 127. Moore's motion to reconsider does not meet any of these grounds. Rather, Moore reasserts the same arguments he advanced to the Court when the Court was considering the original motion. The defendant is simply asking the Court to review and reverse its prior decision. Rule 59(e) is not to be used for such purposes. If this practice is permitted, litigation will never end. The next step will be to file a motion to reconsider a reconsideration, ad infinitum.

ORDER

Now, therefore,

IT IS ORDERED that defendant Moore's motion for reconsideration, Doc. 29, is denied on the merits and because of procedural violations.

Dated this 16th day of May, 1997.

BY THE COURT:

/s/
CHARLES B. KORNMANN
U.S. District Judge

ATTEST:
JOSEPH HAAS, Clerk

BY: s/ Kristin A. Bucky
DEPUTY
(Seal)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

TECHNICAL ORDNANCE, INC. and NORMAN H. HOFFMAN,	*	CIV 95-1039
Plaintiffs,	*	
-vs-	*	ORDER
UNITED STATES OF AMERICA; DOUGLAS MOORE, Special Agent, The Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; and OTHER UNKNOWN ATF AGENTS JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, True Names Unknown,	*	
Defendants.	*	

BACKGROUND

Technical Ordnance, Inc. ("Technical Ordnance") and Norman Hoffman ("Hoffman"), its stockholder-owner and president, instituted this action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), seeking redress for alleged violations of plaintiffs' constitutional rights arising out of the application for and execution of a search warrant and the subsequent criminal prosecution of plaintiffs for the unlawful

manufacture, distribution and storage of explosive materials, CR 93-10025. Jury verdicts were rendered on February 18, 1994, acquitting Technical Ordnance and Hoffman of all 36 counts of the indictment in that case. The jury members unanimously, in conjunction with their verdicts, sent a written statement to the judge, expressing their opinions that these prosecutions should never have been brought.

Counts I, II, and III of the amended complaint allege violations of plaintiffs' First, Fourth, and Fifth Amendment rights. Count IV alleges a conspiracy to deprive plaintiffs of their civil rights in violation of 42 U.S.C. § 1985. Count V alleges a claim under the Federal Tort Claims Act for malicious prosecution. Count VI alleges a claim under the Federal Tort Claims Act for abuse of process, Count VII alleges a claim under the Federal Tort Claims Act for infliction of emotional distress upon Hoffman. Count VIII seeks an injunction against the defendants to prohibit the continuance of an alleged policy to "disrupt, intimidate, harass, threaten, entrap, and otherwise attempt to injure plaintiffs in violation of their rights to freedom of speech and expression . . . and in violation of their rights to be secure in their liberty and property...."

Defendants United States and Douglas Moore ("Moore") moved to dismiss for failure to state a claim under the Fourth and Fifth Amendments and on the basis of qualified immunity. That motion was granted in part, dismissing plaintiffs' Fifth Amendment conspiracy and abuse of process claims against Moore and the United States. The defendants were also granted qualified immunity on plaintiffs' Fourth Amendment claim that the search was unlawfully expanded beyond the warrant. This Court characterized the malicious prosecution claim as arising under the Fourth Amendment and allowed the claim to proceed.

Defendants have now filed a motion for summary judgment, claiming there is no genuine issue of material fact as to whether the search warrant was supported by probable cause and again interposing the defense of official immunity.

Left to be decided in the defendant's motion for summary judgment are the Fourth Amendment violations asserting that Moore deceived the Magistrate in an affidavit he submitted in support of a request for a search warrarnt and, with that same deception, carried through with the prosecution of plaintiffs not supported by probable cause. Within the Fourth Amendment claim is also the malicious prosecution claim. Also at issue is the assertion of First Amendment violations by Moore, alleging that Moore took actions in retaliation for plaintiffs' expression of opposition to the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms ("ATF").

FACTS

In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party and accept as true the nonmoving party's account of the facts where there are material inconsistencies. Guite v. Wright, 147 F.3d 747, 749 (8th Cir. 1998). With that in mind, the Court finds the following facts. Technical Ordnance is a Minnesota corporation with manufacturing facilities in St. Bonifacius, Minnesota, as well as in Clear Lake, South Dakota. Technical Ordnance manufactures propellant actuated devices ("PADs")[1] and explosive devices. It sells these products to the United States Government and, subject to the approval of the United States Department of State through export licenses, to foreign governments and foreign businesses.

Title 18, Chapter 40, 18 U.S.C. §§ 841-848, regulates the importation, manufacture, distribution and storage of explosive materials. Section 847 provides authority to promulgate rules to carry out the provisions of Chapter 40.

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[1] Any tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge. 27 C.F.R. 55.11.

The Secretary has delegated rule-making authority under Section 847 to the ATF. Pursuant to § 842(f), licensees must maintain certain records as required by the Secretary of the Treasury. The specific record keeping requirements are promulgated in 27 C.F.R. § 55.121 et seq. 18 U.S.C. § 843(f) requires licensees to submit to inspection of their records and their storage facilities. Section 845 sets forth various exceptions to the license and inspection requirements.

Specific exemptions are contained in 27 C.F.R § 55.141, which exempts from the record keeping requirements, "[t]he manufacture under the regulation of the military department of the United States of explosive materials for, or their distribution to or storage or possession by, the military or naval services or other agencies of the United States." 27 C.F.R. § 55.141(5). The ATF takes the position that sales to the United States Department of Defense ("DoD") and sales to foreign governments through the DoD, referred to by the ATF as "foreign military sales," do not fall within the purview of the license and record keeping requirements of Chapter 40, but that direct sales to foreign governments or foreign entities, which the ATF calls "commercial sales," are not exempt. The ATF further contends that, notwithstanding the record keeping exemption, only agencies of the United States are exempt from the inspection of storage facilities. The Court found no case interpreting the ATF's regulations regarding exemptions and record keeping. Construction of a statute or regulation by the agency charged with administration thereof is not to be overruled except for weighty reasons. Doe v. Department of Transp., 412 F.2d 674, 678 (8th Cir. 1969).

Hoffman and Technical Ordnance disagreed with the ATF's legal position that certain so-called foreign military sales fell within the ATF's jurisdiction. In plaintiffs' view, foreign military sales are not within ATF jurisdiction. Plaintiffs define foreign military sales as sales to foreign governments or foreign countries, whether sold directly, through the DoD, or through the U.S. Department of State.

They took and continue to take the legal position that sales to foreign governments or to foreign companies, whether or not contracted through the DoD, do not constitute "commercial sales" and are therefore exempt from ATF jurisdiction. For the purposes of this motion, the court finds that the ATF knew exactly how plaintiffs defined foreign military sales and commercial sales.

Throughout the course of Technical Ordnance's business, it has had frequent contacts with the ATF. The record includes a February 14, 1989, Technical Ordnance letter to the ATF. That letter sets forth their (Technical Ordnance and the ATF) apparent common understanding that Technical Ordnance does need an ATF license to manufacture explosive materials that are not manufactured pursuant to a United States government contract and does need an ATF license to manufacture and ship explosives for foreign military sales. Hoffman contends in his declaration that the ATF informed Technical Ordnance that all foreign military sales involving PADs did not require an ATF license. He cites the February 14, 1989, letter in support of that contention. That letter, however, is devoid of any mention of PADs. Despite Hoffman's disagreement with the ATF, at the insistence of the ATF, Technical Ordnance obtained an ATF license in 1989.

A compliance inspection was conducted on April 17, 1990, at the Clear Lake facility. During that inspection, John Yuhas, Technical Ordnance's then vice president, told the ATF inspector that all devices manufactured at the Clear Lake facility are transferred under contract to the DoD and that no devices manufactured at the Clear Lake facility are transferred to any non-governmental or foreign military concern. During that inspection, Hoffman claimed that Technical Ordnance was exempt from ATF jurisdiction concerning the storage of explosives because all its business was on contract through the DoD. The inspector advised Hoffman that the exemption under 18 U.S.C. § 845 did not apply to Technical Ordnance and that, under 18 U.S.C. §

843(f), Technical Ordnance was required to submit to inspection of its storage facilities. Some storage violations were noted.

On May 17, 1990. based upon representations from Technical Ordnance that all explosive devices manufactured at the Clear Lake facility were manufactured under contract with the DoD, the ATF determined that all explosive devices manufactured at that facility were exempt from ATF record keeping requirements.

On July 25, 1990, Yuhas wrote to the ATF inspector and again reiterated that all Technical Ordnance's contracts "are U.S. Government" and stated that Technical Ordnance does not conduct commercial sales but does conduct foreign military sales. On August 7, 1990, the ATF again advised Yuhas that the exemption in 18 U.S.C. § 845 does not apply to Technical Ordnance, even if it is storing only DoD contracted explosives.

On March 20, 1992, Moore and an ATF inspector, agent Kratochvil, inspected Technical Ordnance's facility at Clear Lake, South Dakota. The ATF was investigating three accidental explosions that had occurred there on January 16, 20, and 21, 1992, resulting in injuries to Technical Ordnance employees. According to Moore's affidavit in support of the search warrant, Technical Ordnance reported these explosions to the Defense Contracts Management Administration Office (DCMAO) Safety Officer on January 22, 1992, although according to the DCMAO they should have been reported within three hours of the explosion. None of these accidental explosions were reported by Technical Ordnance to the ATF. Moore was told that Technical Ordnance had contacted an ATF inspector and was told that because of the DoD exemption, no report to the ATF was necessary.

The purpose of the March 20, 1992, inspection also included a follow-up compliance inspection. One of Technical Ordnance's bunkers contained materials that had been part of a DoD Classified Program involving

components of the sidewinder missile. The bunker which contained missile components was sealed with a DoD sticker for classified programs. As only authorized DoD representatives possessed the requisite clearance to inspect classified materials, Technical Ordnance denied the ATF access to the sealed bunker. Technical Ordnance is opposed to the ATF's jurisdiction and stated that agents Moore and Kratochvil.

Agents Moore and Kratochvil asked Hoffman whether Technical Ordnance engaged in commercial activity. Commercial activity, as defined by the defendants, includes sales directly to foreign governments, i.e. not contracted through the DoD. Commercial activity as so defined, according to ATF, is not exempt from ATF jurisdiction and ATF record keeping requirements. Hoffman told the agents that Technical Ordnance engages in DoD contracts and foreign military sales, but that Technical Ordnance, based upon a Technical Ordnance computer printout, currently was working on only DoD contracts at the Clear Lake facility. Hoffman apparently was referring to jobs being worked on at the Clear Lake facility that day.

Based upon Moore's testimony at plaintiffs' criminal trial, Moore knew that plaintiffs defined sales to a foreign government or a foreign company with a Department of State export license as foreign military sales, although the ATF would define those transactions as commercial sales. The ATF defines foreign military sales (exempt from ATF record keeping requirements) as limited to sales to foreign governments through the DoD.

The compliance inspection was apparently completed on March 20, 1992, with the exception of the bunker marked with the DoD sticker. Hoffman told agents Moore and Kratochvil that the records of all DoD contracts and foreign military sales were kept at the St. Bonifacius facility. It is a curious fact that no inspection was made or even attempted by ATF of these records. With the knowledge that the records

were in Minnesota, Moore sought a search warrant for records at Clear Lake as well as for the St. Bonifacius facility.

Moore subsequently conducted an investigation which showed that as of March 24, 1992, Technical Ordnance had a minimum of DoD contract work and that the majority of its business involved foreign and commercial sales, as defined by ATF. Agent Moore also learned that the DoD classified program in which Technical Ordnance had been involved had terminated in December, 1991. Moore knew that Technical Ordnance was involved in what ATF called "commercial sales" to foreign countries, after having obtained Department of State export licenses for those sales. Moore concluded that these sales were not exempt foreign military sales and were subject to ATF jurisdiction. Moore received information that Technical Ordnance had exported over $7,000,000 in shipments to twelve different foreign countries between February 20, 1992, and March 4, 1992. Technical Ordnance had obtained export permits from the Department of State, and ATF claims that such permits would not have been required if the sales were "foreign military sales" exempt from ATF jurisdiction.

On or about October 20, 1992, the ATF obtained search warrants for the premises of Technical Ordnance located in St. Bonifacius, Minnesota, and Clear Lake, South Dakota. Only the Clear Lake affidavit is challenged here, although the affidavit in support of the application for the St. Bonifacius search warrant was substantially similar to the affidavit challenged here. The affidavit in support of the search warrant claimed that violations of 18 U.S.C. § 1001 (false statements) had occurred because, according to Moore, Hoffman had "stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping" while U.S. Customs Service and U.S. State Department documents

showed commercial exports by Technical Ordnance from January 19, 1983 through June 3, 1992. The affidavit also claimed that violations of 18 U.S.C. § 842(f) (failure to maintain records) had occurred. This last statement is a statement with no foundation, given the fact that Moore and ATF had apparently not gone to Minnesota to attempt to see what records Technical Ordnance had. For all they knew, all the records were in Minnesota and sufficient to satisfy the requirements of any federal agency. Moore knew he could not truthfully make such a statement. None of this was disclosed to the Magistrate. Moore based his allegation on his claim that "Hoffman stated he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping" and that based upon commercial export records, Technical Ordnance was "making false statements and claiming an exemption for all activities relating to the manufacture and sale of explosive materials; either no records are being maintained for the commercial transactions, which are required by law and fall within the regulation and jurisdiction of ATF, or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations."

Plaintiffs claim that their Fourth Amendment rights were violated because agent. Moore falsely stated in the affidavit that Hoffman claimed to engage in only DoD contracts when in fact Hoffman told Moore that Technical Ordnance also engages in foreign military sales with the Technical Ordnance definition of such phrase which definition was known to Moore and to ATF. Plaintiffs claim their First Amendment rights were violated when Moore and the ATF obtained and executed an invalid search warrant and prosecuted plaintiffs in retaliation for plaintiffs' expression of opposition to the jurisdiction and regulation by the ATF. Defendants assert that the warrant application was supported by probable cause and even if it was not, Moore is entitled to qualified immunity.

DECISION

Plaintiffs instituted this action pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, supra. In Bivens, the United States Supreme Court held that civil damages suits could be maintained against federal officials for constitutional violations. Bivens, 403 U.S. at 392, 91 S.Ct. at 2002-03. A Bivens action against federal officials is almost identical to an action under 42 U.S.C. § 1983 against state officials. Christian v. Crawford, 907 F.2d 808, 810 (8th Cir. 1990). The two claims involve the same analysis and therefore cases involving § 1983 are persuasive in the Bivens context. See Waddell v. Forney, 108 F.3d 889, 890 n. 2 (8th Cir. 1997). The Court must grant a motion for summary judgment if there are no genuine issues of material fact for trial and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265(1986). The United States Supreme Court has held that:

> The plain language of Rule 56(c) mandates the entry of summary judgment. . .against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2552 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact" Id. at 323, 106 S. Ct. at 2552. "A material fact dispute is genuine if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." Landon v. Northwest Airlines, Inc., 72 F.3d 620, 634 (8th Cir. 1995). If the non-movant's response consists of nothing more than conclusory allegations, the court must enter summary judgment for the movant. Peppers v. Coates, 887 F.2d 1493, 1498 (11th Cir. 1989).

Plaintiffs contend that the defendants' failure to set forth a Statement of Material Facts as required by D.S.D. LR 56.1 should result in denial of their motion for summary judgment. The Court takes a dim view of counsel's failure to follow clearly established procedural rules. Nonetheless, in light of defendant's apology to the Court and the fact that the declaration in support of the motion separately sets forth the facts, the motion will be considered,

Plaintiffs also contend that they cannot defend the motion for summary judgment due to the lack of discovery conducted herein. They therefore seek, pursuant to Fed. R. Civ. P. 56(f), to have the motion denied and a scheduling order entered. The primary purpose of summary judgment on the grounds of qualified immunity is "to protect governmental officials from both the burdens of trial and discovery." Lovelace v. Delo, 47 F.3d 286, 287 (8th Cir. 1995). Both parties submitted affidavits and trial testimony as to what took place during the March 20, 1992, inspection and as to what Moore and Hoffman knew on that date and on the date of the search. Plaintiffs have not, however, been able to depose Moore or Kratochvil. They have not had access to ATF records as to plaintiffs. John Yuhas, a vice president of Technical Ordnance who had dealings with ATF, is deceased. Limited discovery is sometimes appropriate to seek to uncover additional evidence sufficient to create a genuine issue as to whether the defendants in fact violated clearly established law. Johnson v. Boreani, 947 F.2d 67, 70 (8th Cir.

1991), (quoting from Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2606, 2815, 86 L. Ed. 2d 411 (1985)). Even with the lack of even limited discovery, the court is able to resolve the summary judgment motion. Were the court unable to do so, the motion would be denied to permit plaintiffs to conduct the limited discovery discussed above.

The dispute arises over statements made and omitted by Moore in obtaining a search warrant for the Clear Lake facility. Moore intentionally misrepresented the facts when he told the Magistrate that Hoffmann, as president and stockholder-owner of Technical Ordnance, had told Moore that Technical Ordnance was involved in DoD work only. Moore failed to tell the Magistrate the definitions that he knew were being used by plaintiffs. He failed to tell the Magistrate the facts as to what he knew about the records being in Minnesota and the fact that ATF made no effort to go and see what was there. The issue, for purposes of the qualified immunity claim, is whether, in the absence of all this information, there would still have been probable cause for the search warrant.

"Whether a given set of facts entitles the defendant to qualified immunity is a question of law," Creighton v. Anderson, 922 F.2d 443, 446 (8th Cir. 1990). However, if there is a dispute over facts that might affect the outcome of the suit under the law of qualified immunity, there can be no summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). As held in George v. City of St. Louis, "[i]n the context of a police officer obtaining a warrant, immunity will be lost only where the warrant application is so lacking in the indicia of probable cause as to render official belief in its existence unreasonable." 26 F.3d 55, 57 (8th Cir. 1994), citing Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 1097-98, 89 L. Ed. 2d 271 (1986). "The issue is not whether the affidavit actually establishes probable cause, but rather whether the officer had an objectively reasonable belief that it established probable

cause." Thompson v. Reuting, 968 F.2d 756, 760 (8th Cir. 1992).

In resolving the qualified immunity defense in the summary judgment context, there are four steps that need to be considered by the court:

> "First, the court must determine whether the plaintiff has alleged the violation of a constitutional right. Second, the court must determine whether the right was "clearly established" at the time of the alleged violation. Third, if the constitutional right was clearly established, the court must determine whether there are material facts in dispute regarding the objective reasonableness of the defendant's conduct in light of the law and the facts known to the defendant at the time. Lastly, if the facts are undisputed, and the defendant could be found to have acted reasonably if the conduct is viewed objectively, then summary judgment must be granted for the defendant."

Doran v. Condon, 5 F.Supp.2d 1067, 1072 (D. Neb. 1998) (quoting Cross v. City of Des Moines, 965 F.2d 629, 631-33 (8th Cir. 1992)). In a § 1983 action, when the defendant raises qualified immunity as a defense, the burden shifts to the plaintiff to establish that the defendant violated clearly established constitutional rights. Guffey v. Wyatt, 18 F.3d 869, 871 (10th Cir. 1994). According to Creighton v. Anderson, once the plaintiff has demonstrated that the law governing the plaintiffs rights was clearly established at the time of the defendant's acts, the defendant has the burden of proof with respect to all other elements of the qualified immunity defense. 922 F.2d at 447.

Plaintiffs have alleged a violation of their Fourth Amendment rights. "The law was clearly established that the presentation of an affidavit for a search warrant that contains materially false statements of omissions, knowingly

or recklessly made in conscious disregard of the truth, violates the Fourth Amendment, when, if the affidavit is corrected to rectify the incorrect statements of omissions, no probable cause exists and a search warrant is issued because of the incorrect affidavit. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978)." Doran, at 1072-73. The burden thus shifts to the defendants to show that there are no material facts in dispute regarding Moore's conduct in light of the law and the facts known to Moore at the time he signed the affidavit in support of the search warrant and that Moore acted reasonably if his conduct is viewed objectively.

In Franks v. Delaware,

> the Supreme Court held that the Fourth Amendment is violated when a search warrant is issued upon an affidavit containing a falsehood if three things are established: (1) a statement is included in an affidavit for search warrant which was in fact false; (2) either (a) the statement was deliberately made with knowledge of its falsity, or (b) the statement was made with reckless disregard of the truth; and, (3) the false statement was material–that is, without the false statement the affidavit fails to establish probable cause for the issuance of the warrant.

Jones v. United States, 878 F. Supp. 1290, 1293 (D. Neb. 1995), citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676- 77, 57 L. Ed.2d 667 (1978).

> In determining whether any of these elements exist, the court applies the following five caveats: 1) a negligent or innocent mistake is not enough; 2) a statement may be untrue because it is literally false, or because it contains omissions that render the statements false when viewed from the perspective of the judge who reviewed the search-warrant

affidavit; 3) law enforcement officers cannot be expected to put everything they kn[illegible] a search warrant affidavit, and thus an omission is actionable only if it is designed to mislead or is made with reckless disregard of whether it would mislead; 4) it is normally not enough to prove reckless disregard from omitted information alone; 5) even a deliberate lie or reckless disregard for the truth is not enough if considering the false statement, the search warrant affidavit as corrected would still have supported the existence of probable cause.

Jones v. United States, 878 F. Supp. at 1293-94.

Certain facts are not genuinely in dispute on the present record. Moore knew that plaintiffs objected to ATF jurisdiction and the inspection and record keeping requirements that went with that jurisdiction, but that Technical Ordnance had nonetheless obtained an ATF license for its activities. On the day of the March 1992 inspection, Technical Ordnance was working on only DoD contract work. Hoffman told Moore, however, that Technical Ordnance does engage in both DoD contract work and foreign military sales. Moore knew that plaintiffs included in their definition of foreign military sales transactions which the ATF deems commercial sales. Notwithstanding plaintiffs' position, the inspection and explosion investigation was allowed to proceed that day, with the exception of the inspection of the bunker marked classified. When Moore inquired about record keeping, Hoffman advised Moore that the records were kept at the St. Bonifacius facility. Following the March inspection, Moore obtained information that substantiated the ATF's position that Technical Ordnance engaged in non-exempt commercial transactions which did come under the claimed jurisdiction and record keeping requirements of the ATF. Moore did not even attempt to inspect the St. Bonifacius facility to determine if Technical Ordnance was nonetheless keeping

the appropriate records. Thus, Moore had no information at all upon which to base the assertion in his affidavit in support of the search warrant that "either no records are being maintained...or false records are being maintained...." He presented false information to the magistrate. Moore also did not have any reasonable basis to believe that Hoffman had made a false statement. On the day of the inspection, he knew that Technical Ordnance was working on only DoD contracts. Hoffman told Moore, however, that Technical Ordnance manufactured and sold products both to fulfill DoD contracts and foreign military sales, which Moore knew included what ATF considered non-exempt commercial sales.

On the record before the Court, several statements included in the affidavit for search warrant were in fact false and material facts tending to show that probable cause was lacking were intentionally omitted. These statements were deliberately made with knowledge of their falsehood and incompleteness. The false and misleading statements were material in that if the affidavit had not contained false statements and had contained the omitted information, the affidavit fails to establish probable cause for the issuance of the warrant.

Where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, the shield of immunity will be lost. Malley v. Briggs, 475 U.S. 335, 344, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986). In Illinois v. Gates, the Supreme Court held that probable cause requires only the probability of criminal activity, not a prima facie showing, 462 U.S. 213, 235, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527 (1983). In the context of a qualified immunity defense, where a motion for summary judgment has been filed by the defense, the relevant question becomes "the objective (albeit fact-specific) question of whether a reasonable [defendant] could have believed (the challenged conduct) to be lawful, in light of clearly established law and the information the [defendant]

possessed." Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987). The question for qualified immunity purposes is not "whether the judge was correct in assessing the question of probable cause, but whether the officers could have objectively believed that probable cause existed." Kohl v. Casson, 5 F.3d 1141, 1146-47 (8th Cir. 1993). Viewing the totality of the affidavit by Moore, and the information he possessed at the time he executed the affidavit, no reasonable person under the same circumstances could have felt there was probable cause to believe that a crime was being committed. Moore knew that plaintiffs included in their definition of "foreign military sales" transactions which the ATF deemed commercial. Therefore, Moore knew that plaintiffs were not claiming Technical Ordnance was not engaging in these transactions. Although plaintiffs took the position that Technical Ordnance was therefore exempt from ATF inspection and record keeping, the inspection was allowed to continue. Moore had no evidence that Technical Ordnance was not keeping the appropriate records.

A reasonable officer would have known there was no probability or even the possibility of criminal activity. A reasonable officer would have known that the dispute and the argument over definitions should have been dealt with in some administrative manner, not in the context of accusations of criminal activity, with search warrants involving two places of business. There was no emergency or any danger of records being destroyed. If Moore believed, although without any foundation therefor, that no sufficient records existed, the fact of "no records" was not going to change while the ATF proceeded administratively or in the context of a declaratory judgment lawsuit. Citizens are allowed to differ with federal officials as to what the law is without being subjected to what transpired in this case.

Agent Moore is not entitled to qualified immunity from damages for his actions arising out of the presentment of the affidavit in support of the search warrant.

All other claims in the amended complaint that remain are derivative of the Fourth Amendment claim. Liability for malicious prosecution and prosecution in an attempt to chill First Amendment rights depend upon the ultimate finding of whether there was probable cause for the search warrant, an issue that must be decided after discovery and trial. The motion for summary judgment as it pertains to those issues is therefore denied.

Pursuant to D.S.D. LR 7.1, the motion for summary judgment will be decided without oral argument. Jetton v. McDonnell Douglas Corp., 121 F.3d 423, 426-427 (8th Cir. 1997). Plaintiffs' request for oral argument, Doc. 45, has been considered and is denied.

ORDER

Now, therefore,

IT IS ORDERED that the motion for summary judgment, Doc. 38, should be and is denied.

Dated this 30th day of September, 1998.

BY THE COURT:

/s/
CHARLES B. KORNMANN
U.S. District Judge

ATTEST:

JOSEPH HAAS, Clerk

BY: s/Gineen L. Madsen
DEPUTY

(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

TECHNICAL ORDNANCE, INC. and NORMAN H. HOFFMAN,	*	CIV 95-1039
Plaintiffs,	*	
-vs-	*	ORDER
UNITED STATES OF AMERICA; DOUGLAS MOORE, Special Agent, The Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; and OTHER UNKNOWN ATF AGENTS JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, True Names Unknown,	*	
Defendants.	*	

INTRODUCTION

Plaintiffs instituted this action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act, 28 U.S.C. § 1346, seeking redress for alleged violations of plaintiffs' constitutional rights arising out of the procurement of search warrants, the investigation, and the prosecution of plaintiffs for unlawful manufacture, distribution and storage

of explosive materials, CR 93-10025. Jury verdicts were rendered on February 18, 1994, acquitting Technical Ordnance and Hoffman of all 36 counts of the indictment in that case.

Counts I, II, and III of plaintiffs' amended complaint allege violations of plaintiffs' First, Fourth, and Fifth Amendment rights. Count IV alleges a conspiracy to deprive plaintiffs of their civil rights in violation of 42 U.S.C. § 1985. Count V alleges a claim under the Federal Tort Claims Act for malicious prosecution. Count VI alleges a claim under the Federal Tort Claims Act for abuse of process. Count VII alleges a claim under the Federal Tort Claims Act for what is presumed to be intentional infliction of emotional distress upon plaintiff Hoffman. Count VIII seeks an injunction against the defendants to prohibit the continuance of an alleged policy to "disrupt, intimidate, harass, threaten, entrap, and otherwise attempt to injure plaintiffs in violation of their rights to freedom of speech and expression . . . and in violation of their rights to be secure in their liberty and property. . . ."

This is the third time this matter has come before the Court on a dispositive motion. Defendants previously filed a motion to dismiss for failure to state a claim and to assert a defense of qualified immunity. This Court granted the motion to dismiss only as to plaintiff's Fifth Amendment, conspiracy and abuse of process claims and granted defendant Moore qualified immunity on plaintiffs' Fourth Amendment claim that the search was unlawfully expanded beyond the warrant.

Following the denial of a motion to reconsider (made in violation of the Federal Rules of Civil Procedure which rules do not allow for a motion to reconsider or a motion to reconsider the denial of a motion to reconsider, ad infinitum), defendants appealed but subsequently withdrew the appeal and instead sought summary judgment, asserting there was no genuine issue of material fact that the search warrant affidavit was supported by probable cause and again

interposing the defense of official immunity. That motion for summary judgment was denied because the facts, viewed in the light most favorable to the plaintiffs, showed that the warrant application was so lacking in indicia of probable cause as to render official belief in its existence unreasonable and, therefore, agent Moore was not entitled to qualified immunity from damages for his actions arising out of the presentment of the affidavit in support of the search warrant.

Defendants have now filed two separate motions for summary judgment. Moore contends in his motion that, following discovery, there now exists no genuine issue of material fact in the record that agent Moore's affidavit "contained no false statements or material misleading omissions and that a law enforcement officer could reasonably believe - as SA Moore did - that probable cause existed for a search warrant." Moore further contends that the law in the Eighth Circuit does not clearly establish "malicious prosecution" as a constitutional injury actionable under Bivens. Finally, Moore contends plaintiffs have failed to identify any retaliatory motive to support their malicious and retaliatory prosecution claims. The United States contends in its motions that the plaintiffs' federal tort claim for malicious prosecution is barred by sovereign immunity because the Federal Tort Claims Act waiver of immunity is limited to acts of investigative law enforcement officers and does not extend to the Assistant United States Attorneys who prosecuted plaintiffs. Even if Moore was responsible for plaintiffs' prosecution, the United States argues, he is shielded from liability under the Federal Tort Claims Act by the discretionary exception doctrine. The United States argues that even if Moore is not shielded by the discretionary exception doctrine, plaintiffs have failed to show that the prosecution was without probable cause or was motivated by malice. The United States also contends that plaintiffs have failed to establish the tort of intentional infliction of emotional distress.

Defendants filed a motion under Fed. R. Civ. P. 35 for a mental examination of Hoffman by Dr. David Bean. Defendants contend Hoffman put his mental state in issue when he made a claim for emotional distress damages.

Defendants filed a motion to strike plaintiffs' statement of material facts in resistance to defendants' motions for summary judgment and the declaration in support thereof. Defendants contend these items are replete with arguments, legal conclusions, hearsay, statements made without personal knowledge, and statements that are unadorned by citations to the evidentiary record.

Two days prior to the motions hearing, plaintiffs filed a motion to compel the production of the ATF investigative report regarding the administrative claims filed by Technical Ordnance and Hoffman. In response to a request for such document in an interrogatory, defendants asserted that those documents were privileged. Plaintiffs alternatively seek in camerainspection of the documents to determine the validity of the claim of privilege. Defendants have submitted documents to the Court for in camerareview and have filed their opposition (Doc. 103) to the motion to compel production of the ATF report, the defendants objecting to plaintiffs seeing such report. Such documents are now under in camerareview by the Court.

Although the parties were orally advised on the record at oral argument that this case was finally going to trial, defendants have now filed what they caption as a request for ruling (Doc. 110), a creature unknown to the common law or the Federal Rules of Civil Procedure. In the alternative, defendants have moved to sever and postpone the trial on the Bivens claims. This is despite the fact that this is the oldest case on the docket of this Court and the Court has recently been required to report this case as pending more than three years.

Plaintiffs filed on October 22, 1999, a "notice of recent decision"(Doc. 108), attaching a copy of a case decided by the United States Court of Appeals for the Eighth Circuit on

March 29, 1999. Such action was unnecessary, given the fact that this Court reads each and every decision decided in the Eighth Circuit, including the case cited. Defendants filed a motion to strike such filing by plaintiffs (Doc. 111). This Court has no intention of prohibiting counsel in any case from submitting any additional authority missed during the briefing schedule. The filing made by plaintiffs is, in any event, harmless and causes no prejudice to defendants since the Court was well aware of such "recent" decision.

DECISION

I. Probable Cause.

The Court need not repeat here the standards for summary judgment which have been set out in previous orders. The record has not changed substantially. The plaintiffs have set forth in response to the motions for summary judgment sufficient facts which, if established at trial, would show that Moore knew that, at the time of the compliance inspection, Hoffmann objected to ATF's jurisdiction and oversight. Despite his objections, Hoffmann had procured for Technical Ordnance the necessary ATF license as he was required by law to do. Since, despite his objections, Hoffmann complied with the law, there exists a genuine issue for trial whether or not it was objectively reasonable to assume that either no records or inadequate records existed, as alleged in the warrant application. Moore was told that the records were in Minnesota but neither he nor any other government agent went to Minnesota to see what was there. During the inspection, Hoffmann and the inspectors looked at current printouts of Technical Ordnance's jobs in progress which showed only exempt projects were being worked on at that time. Thus, Hoffmann's statement that Technical Ordnance is "currently" working on only DoD contracts was not inaccurate and Moore knew that. A reasonable trier of fact

could conclude that Moore's affidavit was not based upon probable cause and was knowingly false. The motion for summary judgment should be denied as it relates to plaintiffs' Fourth Amendment claim.

II. Malicious Prosecution.

A. Existence of Claim.

The United States Supreme Court held in Albright v Oliver, 510 U.S. 266 (1994), that a constitutional claim of malicious prosecution must be grounded on an explicit constitutional provision, not on the generalized notion of substantive due process. The threshold of a constitutional malicious prosecution claim is "some deprivation of liberty consistent with the concept of 'seizure.'" Singer v. Fulton County Sheriff, 63 F.3d 110 (2nd Cir. 1995). The Third Circuit has held that post-indictment restrictions consisting of the need to post bond, forced attendance at court proceedings, weekly contacts with pretrial services officials, and limits on out-of-state travel are enough to satisfy the "seizure" element. Gallo v. Philadelphia, 161 F.3d 217, 222 (3d Cir. 1998). Albright noted that as long as a defendant is bound to appear in court and answer criminal charges, a "seizure" of the person under the Fourth Amendment exists. Albright v. Oliver, 510 U.S. at 277-278. The record is sufficient to show a claimed Constitutional deprivation.

Moore contends that plaintiffs have not shown a clearly established constitutional right to support a malicious prosecution claim. The D.C. Circuit held in 1995 that "it has not been clearly established that malicious prosecution violates any constitutional or statutory right." Moore v. Valder, 65 F.3d 189, 195 (D.C. Cir. 1995). Agent Moore misunderstands. What plaintiffs must show is a clearly established constitutional right, which they have done. It was clearly established at the time of Moore's conduct that lying in an affidavit in support of an application for a search

warrant constitutes an illegal seizure without probable cause. Plaintiffs have a clearly established constitutional right to be free from Fourth Amendment seizures, absent probable cause. The exact nature of the cause of action, whether it be under the Federal Tort Claims Act, a Bivens action, or whatever need not be clearly established at the time of the offense. That Moore's alleged conduct was wrongful was clearly established. There exists a cause of action for such wrongful conduct and that cause of action is malicious prosecution.

B. Moore's Responsibility.

Moore and the United States contend that since Moore was not personally responsible for the decision to indict and prosecute, he cannot be held personally responsible. Moore cites several cases in support of his claim, including Albright v Oliver, supra and Ames v. United States, 600 F.2d 183 (8th Cir. 1979). However, Ames recognized that a "specific allegation, such as the presentation of false evidence or the withholding of evidence" may nullify the general rule that "the grand jury indictment breaks any chain of causation linking the employees' activities to the institution of criminal proceedings, thus insulating the F.B.I. and Justice Department employees from tort liability." Ames v. United States, 600 F.2d at 185; Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) ("(A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial--none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision."); Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981). A law enforcement officer who knowingly gives false and misleading information to a prosecutor or grand jury, or knowingly omits exculpatory information, is liable for the ensuing prosecution without probable cause. See Barlow v. Ground, 943 F.2d 1132, 1136-37 (9th Cir. 1991); Robinson v.

Maruffi, 895 F.2d 649, 655-56 (10th Cir. 1990). Although the cited actions were commenced under § 1983, the United States Court of Appeals for the Eighth Circuit has previously noted that a Bivens action is almost identical to an action under 42 U.S.C. § 1983 against state officials. Christian v. Crawford, 907 F.2d 808, 810 (8th Cir. 1990), and since the two claims involve the same analysis, cases involving § 1983 are persuasive in the Bivens context. Waddell v. Forney, 108 F.2d 889, 890 n. 2, (8th Cir. 1997). See alsoMoore v. Valder, 65 F.3d 189, 192 (D.C. Cir. 1995) (The law of immunity in a Bivens claim mirrors that in a § 1983 claim and we look to those decisions for guidance.). Agent Moore's alleged knowingly false or misleading statements in his affidavit, to the prosecutor and to the grand jury, may subject him to liability for the ensuing prosecution.

C. Discretionary Function Exception.

The United States contends in its brief that it cannot be held liable under the Federal Tort Claims Act for any action on Moore's part to bring about the prosecution of the plaintiffs, the United States relying on the "discretionary functions" exception to the FTCA, 28 U.S.C. § 2680(a). The FTCA is a waiver of sovereign immunity, limited in part by the discretionary function exception. Sabow v. United States, 93 F.3d 1445, 1451 (9th Cir. 1996). The discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). "The United States bears the ultimate burden of proving the applicability of the discretionary function exception . . . ." Autery v. United States, 992 F.2d 1523, 1526 (11th Cir. 1993); Prescott v. United States, 973 F.2d 696, 702 (9th Cir. 1992); Carlyle v. United States, 674 F.2d 554, 556 (6th Cir. 1982); Stewart v. United States, 199 F.2d 517, 520 (7th Cir. 1952).

The United States Supreme Court has developed a two part test to determine whether a government employee's acts fall within the discretionary function exception:

> In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. See Dalehite v.United States,346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953) (stating that the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course"). Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. Westfall v. Erwin484 U.S. 292, 296-297, 108 S.Ct. 580, ---, 98 L.Ed.2d 619 (1988) (recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).
>
> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. Varig Airlinessupra, at 814,

> 104 S.Ct., at 2764-2765. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. See Dalehite v. United States, supra, at 36, 73 S.Ct. at 968 ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

Berkovitz v. United States, 486 U.S. 531, 536-37, 108 S.Ct. 1954, 1958-59, 100 L.Ed.2d 531 (1988). The United States contends that a government employee's conduct in presenting evidence to a grand jury or in conducting a criminal prosecution falls within the ambit of the discretionary function exception, barring any tort claim arising from that conduct. The United States Court of Appeals for the Ninth Circuit has rejected this contention, holding that although "the decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability," the conduct of the agent "in implementing that decision, however, including the nature of his testimony before the grand jury, is not immune as a discretionary function." Wright v. United States, 719 F.2d 1032, 1035 (9th Cir. 1983). In any event, presenting false testimony to the grand jury and presenting false or misleading information to the prosecutor or withholding material information falls outside the discretionary function exception. Ames, supra

III. Retaliatory Prosecution.

Moore argues that plaintiffs' retaliatory prosecution claim cannot go forward since plaintiff, in addition to meeting the elements of such a claim, "must put forward specific, nonconclusory factual allegations' (sic) that establish

improper motive causing cognizable injury." Crawford-El v. Britton, 118 S.Ct. 1584, 1596 (1988). Plaintiffs have set forth specific factual allegations on page 21 of their brief in response to Moore's motion for summary judgment, which are supported by the record, as to Hoffman's political beliefs, Moore's knowledge of those beliefs, and Moore's response to those beliefs, both to the plaintiffs and to others within the ATF. It is for the jury to decide whether the search warrant applications and the ensuing prosecution so lacked probable cause as to raise more than an inference that Moore acted in retaliation.

IV. Intentional Infliction of Emotional Distress.

Motion for Rule 35 Examination.

Plaintiffs allege in their amended complaint that defendant Moore and others intentionally and willfully caused Hoffman extreme emotional distress. Although not captioned so, this is a claim for intentional infliction of emotional distress. The South Dakota Supreme Court has held:

> That recovery can be had for mental pain, though no physical injury results, when the following elements are present: the act causing the anguish was done intentionally, the act was unreasonable, and the actor should have recognized it as likely to result in emotional distress. It has also been said of this tort that "there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind."

Groseth International v. Tenneco, 440 N.W.2d 276, 289 (S.D. 1989) (citations omitted).

Defendants contend that, in his deposition, Hoffman conceded that he did not suffer extreme and disabling emotional distress. Hoffman contends that the severity of his distress can only be evaluated after hearing testimony from his wife and co-workers. He did not proffer those person's affidavits in resistance to the motion for summary judgment. Hoffman contends that under South Dakota law, "stress, humiliation or mental anguish are enough to present a case to the jury on a claim for intentional infliction of emotional distress. Hayes v. Northern Hills General Hosp., 590 N.W.2d 234, 252 (S.D. 1999).

It should be noted that the defendants seek a Rule 35 mental examination in order to establish the causal relationship, if any, between any psychological affliction suffered by Hoffman and defendants' alleged conduct. Hoffman cites cases holding that claims for mental anguish damages do not justify a Rule 35 examination. Hoffman asserts he is only seeking damages for emotional distress, mental anguish, embarrassment, humiliation, and damage to reputation resulting from Moore's wrongful conduct. Plaintiff contends that he is not currently treating for any psychological condition and that he is not seeking damages for a specific psychological condition. He does not intend to offer any expert testimony relating to these damages.

Defendants respond that Hoffman's contentions in resistance to the motion for a Rule 35 mental examination are tantamount to an admission that he cannot establish such a claim. The motion for a Rule 35 mental examination should be denied. It is highly unlikely, given the evidence provided to the Court on Summary Judgment, that any claim of mental damages will go to the jury. In any case of physical injury it is necessary to establish by expert medical opinion the causation between the alleged tort and the damages. The same must be true for mental injury which is even more subjective. Absent expert testimony that the mental injury was, based upon reasonable medical probability or certainty,

proximately caused by the claimed actions of a defendant, or defendants, the claim should not go before the jury.

V. Motion to Strike.

Defendants moved to strike plaintiffs' second statement of facts, which was filed as Doc. 91, contending the statement is in the nature of a brief in that it contains extensive argument. One of the primary factual issues presented by plaintiffs' claims is Moore's motivation. Subjective motivation would be difficult to show absent a thorough revelation of the background and facts concerning Moore's contacts with the plaintiffs and without drawing some inferences in the statement of facts. Although plaintiffs have not complied with the spirit of D.S.D. LR 56.1(c), the Court hesitates to criticize the plaintiffs for being too thorough. This Court is not inclined to strike Doc. 91. To the extent it contains argument, the Court disregards such argument.

VI. Motion to Compel.

As set forth during the hearing, the Court grants the motion to compel only to the extent it seeks an in camera inspection of the requested documents. Defendants have already submitted to the Court in camera those records contained in plaintiffs' request which defendants contend are privileged and, in a separate submission to plaintiffs, those portions of the records as to which there is no claim of privilege.

VII. Motion for a Ruling.

The so-called request for a hearing (Doc. 110) should be denied as moot and not warranted, given the repeated motions filed by defendants and the case load of the Court. Counsel are not required to remind the Court of pending

motions. The motion to sever or delay trial should also be denied.

VIII. Motion to Strike.

For the reasons previously stated, this motion should be denied.

ORDER

Based upon the foregoing

IT IS ORDERED:

1. Defendant Moore's motion for summary judgment, Doc. 76, is denied.
2. Defendant United States' motion for summary judgment, Doc. 78, is denied.
3. Defendants' motion for Rule 35 examination, Doc. 67, is denied.
4. Defendants' motion to strike, Doc. 94, is denied.
5. Plaintiffs' motion to compel, Doc. 95, is denied. Plaintiffs motion for an in camerainspection, Doc. 95, is granted.
6. Defendants' request for a ruling or, in the alternative, for a stay of trial (Doc. 110) is denied.
7. Defendants' motion to strike (Doc. 111) is denied.
8. Defendants' motion for leave to have officials participate by telephone in the mediation session (Doc. 105) is denied as moot, the mediation session having been already conducted and having been unsuccessful.

Dated this 28th day of October, 1999.

BY THE COURT:

/s/
CHARLES B. KORNMANN
U.S. District Judge

ATTEST:

JOSEPH HAAS, Clerk

BY: s/Gineen L. Madsen
DEPUTY

(SEAL)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-4334

Technical Ordnance, Inc., et al.,	*	
Appellees,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
United States of America, et al.,	*	
Appellants.	*	

The petition for rehearing en banc is denied. Chief Judge Wollman would grant.

The petition for rehearing by the panel is also denied. (5128-010199)

August 15, 2001

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

18 U.S.C. § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to –

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 842. Unlawful acts

(a) It shall be unlawful for any person—

(1) to engage in the business of importing, manufacturing, or dealing in explosive materials without a license issued under this chapter;

(2) knowingly to withhold information or to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive for the purpose of obtaining explosive materials, or a license, permit, exemption, or relief from disability under the provisions of this chapter; and

(3) other than a licensee or permittee knowingly—

(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials, except that a person who lawfully purchases explosive materials from a licensee in a State contiguous to the State in which the purchaser resides may ship, transport, or cause to be transported such explosive materials to the State in which he resides and may receive such explosive materials in the State in which he resides, if such transportation, shipment, or receipt is permitted by the law of the State in which he resides; or

(B) to distribute explosive materials to any person (other than a licensee or permittee) who the distributor knows or has reasonable cause to believe does not reside in the State in which the distributor resides.

(b) It shall be unlawful for any licensee knowingly to distribute any explosive materials to any person except—

(1) a licensee;

(2) a permittee; or

(3) a resident of the State where distribution is made and in which the licensee is licensed to do business

or a State contiguous thereto if permitted by the law of the State of the purchaser's residence.

(c) It shall be unlawful for any licensee to distribute explosive materials to any person who the licensee has reason to believe intends to transport such explosive materials into a State where the purchase, possession, or use of explosive materials is prohibited or which does not permit its residents to transport or ship explosive materials into it or to receive explosive materials in it.

(d) It shall be unlawful for any person knowingly to distribute explosive materials to any individual who:

(1) is under twenty-one years of age;

(2) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(3) is under indictment for a crime punishable by imprisonment for a term exceeding one year;

(4) is a fugitive from justice;

(5) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); or

(6) has been adjudicated a mental defective.

(e) It shall be unlawful for any licensee knowingly to distribute any explosive materials to any person in any State where the purchase, possession, or use by such person of such explosive materials would be in violation of any State law or any published ordinance applicable at the place of distribution.

(f) It shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Secretary may by regulation require, including, but not limited to, a statement of intended use, the name, date, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom explosive materials are distributed. If explosive materials are distributed to a corporation or other business

entity, such records shall include the identity and principal and local places of business and the name, date, place of birth, and place of residence of the natural person acting as agent of the corporation or other business entity in arranging the distribution.

(g) It shall be unlawful for any licensee or permittee knowingly to make any false entry in any record which he is required to keep pursuant to this section or regulations promulgated under section 847 of this title.

(h) It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

(i) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any explosive in interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in interstate or foreign commerce.

(j) It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary. In promulgating such regulations, the Secretary shall take into consideration the class, type, and quantity of explosive materials to be

stored, as well as the standards of safety and security recognized in the explosives industry.

(k) It shall be unlawful for any person who has knowledge of the theft or loss of any explosive materials from his stock, to fail to report such theft or loss within twenty-four hours of discovery thereof, to the Secretary and to appropriate local authorities.

(l) It shall be unlawful for any person to manufacture any plastic explosive that does not contain a detection agent.

(m)(1) It shall be unlawful for any person to import or bring into the United States, or export from the United States, any plastic explosive that does not contain a detection agent.

(2) This subsection does not apply to the importation or bringing into the United States, or the exportation from the United States, of any plastic explosive that was imported or brought into, or manufactured in the United States prior to the date of enactment of this subsection by or on behalf of any agency of the United States performing military or police functions (including any military reserve component) or by or on behalf of the National Guard of any State, not later than 15 years after the date of entry into force of the Convention on the Marking of Plastic Explosives, with respect to the United States.

(n)(1) It shall be unlawful for any person to ship, transport, transfer, receive, or possess any plastic explosive that does not contain a detection agent.

(2) This subsection does not apply to—

(A) the shipment, transportation, transfer, receipt, or possession of any plastic explosive that was imported or brought into, or manufactured in the United States prior to the date of enactment of this subsection by any person during the period beginning on that date and ending 3 years after that date of enactment; or

(B) the shipment, transportation, transfer, receipt, or possession of any plastic explosive that

was imported or brought into, or manufactured in the United States prior to the date of enactment of this subsection by or on behalf of any agency of the United States performing a military or police function (including any military reserve component) or by or on behalf of the National Guard of any State, not later than 15 years after the date of entry into force of the Convention on the Marking of Plastic Explosives, with respect to the United States.

(o) It shall be unlawful for any person, other than an agency of the United States (including any military reserve component) or the National Guard of any State, possessing any plastic explosive on the date of enactment of this subsection, to fail to report to the Secretary within 120 days after such date of enactment the quantity of such explosives possessed, the manufacturer or importer, any marks of identification on such explosives, and such other information as the Secretary may prescribe by regulation.

(p) Distribution of information relating to explosives, destructive devices, and weapons of mass destruction.—

(1) Definitions.—In this subsection—

(A) the term "destructive device" has the same meaning as in section 921(a)(4);

(B) the term "explosive" has the same meaning as in section 844(j); and

(C) the term "weapon of mass destruction" has the same meaning as in section 2332a(c)(2).

(2) Prohibition.—It shall be unlawful for any person—

(A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an

activity that constitutes a Federal crime of violence; or

(B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

27 C.F.R. § 55.141 Exemptions

(a) General. Except for the provisions of §§ 55.180 and 55.181, this part does not apply to:

(1) Any aspect of the transportation of explosive materials via railroad, water, highway, or air which is regulated by the U.S. Department of Transportation and its agencies, and which pertains to safety.

(2) The use of explosive materials in medicines and medicinal agents in the forms prescribed by the official United States Pharmacopeia or the National Formulary. "The United States Pharmacopeia and The National Formulary, " USP and NF Compendia, are available from the United States Pharmacopeia Convention, Inc., 12601 Twinbrook Parkway, Rockville, Maryland 20852.

(3) The transportation, shipment, receipt, or importation of explosive materials for delivery to any agency of the United States or to any State or its political subdivision.

(4) Small arms ammunition and components of small arms ammunition.

(5) The manufacture under the regulation of the military department of the United States of explosive materials for, or their distribution to or storage or possession by, the military or naval services or other agencies of the United States.

(6) Arsenals, navy yards, depots, or other establishments owned by, or operated by or on behalf of, the United States.

(7) The importation, distribution, and storage of fireworks classified as UN0336, UN0337, UN0431, or UN0432 explosives by the U.S. Department of Transportation at 49 CFR 172.101 and generally known as "consumer fireworks" or "articles pyrotechnic. "

(8) Gasoline, fertilizers, propellant actuated devices, or propellant actuated industrial tools manufactured, imported, or distributed for their intended purposes.

(9) Industrial and laboratory chemicals which are intended for use as reagents and which are packaged and shipped pursuant to U.S. Department of Transportation regulations, 49 CFR Parts 100 to 177, which do not require explosives hazard warning labels.

(b) Black powder. Except for the provisions applicable to persons required to be licensed under subpart D, this part does not apply with respect to commercially manufactured black powder in quantities not to exceed 50 pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, if the black powder is intended to be used solely for sporting, recreational, or cultural purposes in antique firearms, as defined in 18 U.S.C. 921(a)(16) or antique devices, as exempted from the term "destructive devices" in 18 U.S.C. 921(a)(4).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

TECHNICAL ORDNANCE, INC., a Minnesota corporation, and NORMAN H. HOFFMAN, individually,

Plaintiffs,

v.

DOUGLAS MOORE, a special agent of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; JOHN DOE I through JOHN DOE V, UNKNOWN NAMED AGENTS OF THE ATF, and/or other officials of the United States Government, or other person or persons unknown to plaintiffs at the time of filing this Complaint, whose conduct has individually, or in concert with others, deprived plaintiffs of their Constitutional rights; and the UNITED STATES OF AMERICA.

Defendants.

Civil No. 95-1039

FIRST AMENDED COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF, AND DEMAND FOR JURY TRIAL

For their Complaint against the above named defendants, plaintiffs TECHNICAL ORDNANCE, INC. and NORMAN H. HOFFMAN state and allege as follows:

THE PARTIES

1. Plaintiff TECHNICAL ORDNANCE, INC. ("Technical Ordnance") is a Minnesota corporation with a principal place of business located at 9200 Nike Road, St. Bonifacius, Minnesota, and a manufacturing facility located in Clear Lake, South Dakota. Plaintiff Technical Ordnance may be served with process in matters pertaining to this civil action by serving the undersigned attorneys for plaintiffs. Plaintiff Technical Ordnance manufactures propellant actuated devices ("PADs") and other products. As a United States citizen, plaintiff Technical Ordnance is entitled to all the rights, privileges and immunities under the laws and Constitution of the United States as any other citizen.

2. Plaintiff NORMAN H. HOFFMAN ("Hoffman") is an individual citizen of the United States of America, residing in the State of Minnesota. Plaintiff Hoffman is the President of Technical Ordnance. He may be served with process in matters pertaining to this civil action by serving the undersigned attorneys for plaintiffs. As a natural born citizen of the United States, plaintiff Hoffman is entitled to all the rights, privileges and immunities under the laws and Constitution of the United States as any other citizen.

3. Defendant UNITED STATES OF AMERICA is a party hereto based on the conduct and activities of federal officials and employees within the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury ("the ATF"), and/or other officials of the United States Government, or other person or persons unknown to plaintiffs at the time of filing this complaint, whose conduct has individually, or in concert with others, deprived plaintiffs of their Constitutional rights.

4. Defendant DOUGLAS MOORE ("Moore") at all times material herein was a federal law enforcement officer employed by the ATF as a special agent and assigned to this matter as Case Agent, and is sued in his capacity as such, and

in his individual capacity. At all times relevant hereto, defendant Moore was stationed in Sioux Falls, South Dakota.

5. Defendants JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, and JOHN DOE V are unknown to the plaintiffs at the time of the filing of this Complaint and therefore cannot be named in their true names or capacities. At all times relevant hereto these persons either participated in the conduct forming the basis of this action, or were employed by the ATF and/or other bureaus or agencies of the United States Government as supervisors and/or managers, who consented to and authorized the raids and prosecution in question, and who were responsible for training and supervising defendant Moore and other unknown agents, officials, or employees of the ATF. The identities of these persons cannot be ascertained by due diligence at the time of the filing of this Complaint as this information is being treated as confidential by the Department of the Treasury and the ATF. The ATF has conducted an investigation into the events surrounding the matters alleged herein and the part played by federal officers and agents. Plaintiffs cooperated in that investigation and have been waiting for the report for additional information. Plaintiffs will seek leave of this Court to amend this Complaint to insert the true names and capacities of these individuals designated by the use of the word "Doe" as the same become known upon the release of the federal investigatory report and during the course of discovery in this action. Plaintiffs seek an order tolling any and all applicable statutes of limitation in this matter until a reasonable time after the United States releases the report of the investigation, in order for plaintiffs to make proper amendments to this Complaint.

JURISDICTION AND VENUE

6. This civil action is brought to recover damages and equitable relief against defendants for violations of the First,

Fourth, Fifth, and Sixth Amendments to the United States Constitution and for other violations of state and federal law while the defendants were acting under color of federal law. This Court has jurisdiction, pursuant to the decision of the Supreme Court of the United States in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), to grant redress for violations of the Constitutional rights of citizens committed by federal agents and officers acting in such capacity. In addition, plaintiffs invoke the pendent jurisdiction of this Court over related or ancillary predicate state law claims.

7. The jurisdiction of this Court is founded upon (i) 28 U.S.C. §§ 1331 et. seq., as this civil action arises under the Constitution of the United States; (ii) § 1332(a)(1), because the amount in controversy exceeds $50,000.00 and is between citizens of different states; and (iii) 42 U.S.C. § 1985(3). The defendants have committed or caused to be committed tortious acts within the State of South Dakota and are thus subject to the jurisdiction of this Court by virtue of South Dakota Codified Laws § 15-7-2(2)(1986).

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) as a substantial part of all incidents and occurrences alleged herein happened in South Dakota.

FEDERAL TORT CLAIMS

9. Plaintiffs have filed Federal Tort Claims Act claims against defendant the United States of America pursuant to 28 U.S.C. §§ 1346(b), 2671 et. seq., and 2680 (h).

GENERAL ALLEGATIONS

10. Throughout the course of its business, plaintiff Technical Ordnance informed various government agencies, including the ATF, that plaintiff Technical Ordnance was involved in (i) Department of Defense ("DoD") contracts; and

(ii) foreign military sales, both directly and through export brokers licensed by the U.S. Department of State.

11. During March 1992, defendant Moore and another ATF agent inspected plaintiff Technical Ordnance's facility at Clear Lake, South Dakota. During the inspection, defendant Moore unreasonably took offense to certain requirements that plaintiff Technical Ordnance sought to impose upon him, including without limitation: (1) requiring Moore to sign plaintiff Technical Ordnance's visitors' register; (ii) requiring Moore to wear a security badge; and (iii) requiring Moore to wear proper non-static, safety footwear, before venturing into plaintiff Technical Ordnance's facilities. These measures are required by rules and regulations promulgated by the DoD which plaintiffs Technical Ordnance, Hoffman, and all visitors to plaintiff Technical Ordnance's premises are legally required to follow.

12. During this inspection, defendant Moore refused to sign plaintiff Technical Ordnance's register, refused to wear any security badge, and refused to wear the proper non-static, safety footwear in the explosives bunkers at plaintiff Technical Ordnance.

13. During this inspection, personnel of plaintiff Technical Ordnance stated to the ATF agents that plaintiff Technical Ordnance worked on DoD contracts and foreign military sales at the Clear Lake facility, and that at the time of the inspection all jobs currently being conducted at Clear Lake involved DoD contracts. Plaintiff Technical Ordnance showed the ATF agents a listing of the current DoD contracts at the Clear Lake facility.

14. During the search, plaintiff Technical Ordnance also informed the ATF agents that records of all DoD contracts and foreign military sales were kept at the company's St. Bonifacius facility. Following the inspection at Clear Lake, the ATF agents failed to follow up and go to the St. Bonifacius facility to review any records.

15. During the inspection, Plaintiff Norman H. Hoffman expressed his particular concern over the ATF's harassing

refusal to comply with DoD mandated safety regulations while on the premises of plaintiff Technical Ordnance. Plaintiff Hoffman also expressed to the ATF agents his deeply held philosophy that private enterprises are unduly burdened with excessive and duplicative regulatory oversight by multiple government agencies with conflicting regulations and overlapping jurisdictions.

16. Defendant Moore unreasonably inferred from these statements that plaintiffs were attempting to avoid their legal obligations.

The ATF's Retaliatory Campaign of Intimidation and Harassment

17. Defendant Moore conspired, confederated, combined, and agreed with defendants JOHN DOE I through JOHN DOE V to set out to intimidate, harass, and injure plaintiffs Technical Ordnance and Hoffman in retaliation for their refusal deferentially to acquiesce to the ATF's unwarranted intrusions into plaintiff Technical Ordnance's business. The conduct of defendant Moore and other ATF officials was at all times unlawful, in violation of federal and South Dakota law and the policies and procedures pursuant to which agents of the United States are required to act.

18. In a continuing series of attempts to intimidate and harass plaintiffs, defendant Moore made such comments to personnel of plaintiff Technical Ordnance as: (i) "Do you realize that I wear a badge?"; (ii) "Do you know that I carry a gun?"; and (iii) "Do you understand that I can arrest people?"

The ATF's Fraudulent Procurement of Probable Cause Findings

19. Defendant Moore and other defendants acted negligently and/or intentionally, wrongfully, willfully, wantonly, recklessly, indifferently, and without legal

justification, when said agents raided plaintiff Technical Ordnance's facilities, in that the Affidavits utilized to procure the search warrants were based entirely upon knowingly and/or intentionally false statements, or said Affidavits were based upon statements made with a reckless disregard for their truth or falsity.

20. By way of example and not of limitation, the Affidavits used to procure the search warrants falsely stated that plaintiff Technical Ordnance maintained that it "does only U.S. government DoD contract work." Said statement is demonstrably false by reason that defendants admitted under cross-examination at trial that plaintiffs in fact did tell the ATF that plaintiff Technical Ordnance worked on DoD contracts and foreign military sales.

21. The Affidavits used to procure the warrants also falsely stated that "violations of Title 18, U.S.C., Section 1001, have occurred" for the following four reasons.

22. First, plaintiff "Technical Ordnance Inc. [addresses omitted] is presently, and has been licensed by ATF as an explosives manufacturer since March 2, 1989." This statement directly alleges no violation of any law. The statement also omits facts which would preclude the incriminating inference that plaintiff Technical Ordnance operated unlawfully prior to 1989. Any such an inference is demonstrably false by reason that prior to the acquisition of an ATF license in 1989, plaintiff Technical Ordnance apprised the ATF of the nature of its business through various communications with the ATF and the ATF did not require plaintiff Technical Ordnance to acquire any ATF license. In addition, all Technical Ordnance products are manufactured under the supervisory authority of the DoD and the U.S. Department of State and are otherwise exempt from ATF jurisdiction.

23. Second, "[a]s a Federally licensed explosives manufacturer, Technical Ordnance is required by law to maintain records of manufacture, acquisition and disposition of explosives." This statement also directly alleges no

violation of any law. The statement also omits facts which would preclude the incriminating inference that plaintiff Technical Ordnance failed to maintain records of manufacture, acquisition and disposition of explosives. Any such an inference is demonstrably false by reason that plaintiff Technical Ordnance, by the ATF's own admission, did in fact maintain records of manufacture, acquisition and disposition of explosives, and that all internal memoranda and reports maintained by the ATF in fact concluded that the records of plaintiff Technical Ordnance were proper.

24. Third, "Norman Hoffman, President of Technical Ordnance Inc. and John Yuhas, Vice President of Technical Ordnance Inc., on March 20, 1992, stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping." This statement is demonstrably false by reason that Plaintiff Hoffman and John Yuhas, Vice President of plaintiff Technical Ordnance, in fact stated that the company worked on DoD contracts and foreign military sales. Upon cross-examination at trial the ATF agents admitted that Technical Ordnance personnel told them that the company worked on DoD contracts and foreign military sales. In any event, plaintiff Technical Ordnance's foreign military sales were also exempt from ATF jurisdiction by reason that the products sold comprised exempt PADs and were shipped pursuant to proper export licenses issued by the U.S Department of State.

25. Fourth, "[d]ocuments from the U.S. Customs Service and the U.S. State Department show commercial exports of explosives by Technical Ordnance Inc. from January 19, 1983 through June 3, 1992, totaling approximately $11,100,434.00." This statement directly alleges no violation of any law. The statement also omits facts which would preclude any incriminating inference that plaintiff Technical Ordnance

engaged in said exports illegally. Any such inference is demonstrably false by reason that all such exports were in fact made pursuant to proper export licenses issued by the U.S. Department of State. The export documents from the U.S. Customs Service and the U.S. Department of State simply evidence the foreign military sales which the ATF admitted under cross-examination at trial were disclosed and in fact never concealed by plaintiff Technical Ordnance. Moreover, records of all said foreign sales were available to the ATF at the St. Bonifacius facility, and in fact had been reviewed by ATF agents in the past and been pronounced satisfactory.

26. In addition, the Affidavits used to procure the search warrants also falsely stated that "violations of Chapter 40, Title 18, U.S.C., Section 842 (f) have occurred" for the following seven reasons.

27. First, "Technical Ordnance Inc. [addresses omitted] is presently, and has been licensed by ATF as an explosives manufacturer since March 2, 1989." Again, this statement directly alleges no violation of any law. The statement also omits facts which would preclude the incriminating inference that plaintiff Technical Ordnance operated unlawfully prior to 1989. Any such an inference is demonstrably false by reason that prior to the acquisition of an ATF license in 1989, plaintiff Technical Ordnance apprised the ATF of the nature of its business through various communications with the ATF and the ATF did not require plaintiff Technical Ordnance to acquire any ATF license. In addition, all Technical Ordnance products are manufactured under the supervisory authority of the DoD and the U.S. Department of State and are otherwise exempt from ATF jurisdiction,

28. Second, "[a]s a Federally licensed explosives manufacturer, Technical Ordnance is required by law to maintain records of manufacture, acquisition and disposition of explosives." Again, this statement also directly alleges no violation of any law. The statement also omits facts which

would preclude the incriminating inference that plaintiff Technical Ordnance failed to maintain records of manufacture, acquisition and disposition of explosives. Any such an inference is demonstrably false by reason that plaintiff Technical Ordnance, by the ATF's own admission, did in fact maintain records of manufacture, acquisition and disposition of explosives, and that all internal documents maintained by the ATF in fact concluded that the records of plaintiff Technical Ordnance were proper.

29. Third, "[o]n April 17, 1990, during an ATF Compliance Inspection of Technical Ordnance Inc. Clear Lake, South Dakota, Norman Hoffman and John Yuhas stated that all activities at the Clear Lake facility were related to U.S. Department of Defense government contracts and therefore exempt from ATF regulation. That all of the records of explosive materials acquisitions are kept at the corporate headquarters in Waconia, Minnesota. Explosive materials are transferred from one Technical Ordnance facility to another." This statement is demonstrably false by reason that plaintiff Hoffman and John Yuhas in fact stated that the company worked on DoD contracts and foreign military sales, and that all current contract activities at the Clear Lake facility were related to DoD contracts. Moreover, the ATF conceded at trial that the maintenance of records at the company's then corporate headquarters in Waconia, Minnesota and the shipments of explosive materials from one corporate facility to another were in fact entirely proper.

30. Fourth, "[o]n July 25, 1990, John Yuhas sent a letter to ATF stating that all of the activities at Technical Ordnance Inc., Clear Lake, South Dakota were conducted pursuant to U.S. government contracts." This statement is demonstrably false by reason that John Yuhas' letter merely confirmed the above described conversations in Clear Lake, South Dakota, to the effect that all current activities were related to DoD contracts.

31. Fifth, plaintiff "Norman Hoffman, President of Technical Ordnance Inc. and John Yuhas, Vice President of

Technical Ordnance Inc., on March 20, 1992 stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping." This statement is demonstrably false by reason that plaintiff Hoffman and John Yuhas in fact stated that the company worked on DoD contracts and foreign military sales, and presented to the ATF a listing of jobs showing that all current contract activities at the Clear Lake facility were related to DoD contracts, Pursuant to cross-examination at trial the ATF conceded that plaintiffs had in fact stated as such.

32. Sixth, "[d]ocuments from the U.S. Customs Service and the U, S. State Department show commercial exports of explosives by Technical Ordnance Inc. from January 19, 1983 through June 3, 1992, totaling approximately $11,100,434,00." Again, this statement directly alleges no violation of any law. The statement also omits facts which would preclude any incriminating inference that plaintiff Technical Ordnance engaged in said exports illegally. Any such inference is demonstrably false by reason that all such exports were in fact made pursuant to proper export licenses issued by the U.S. Department of State. The export documents from the U.S. Customs Service and the U.S. Department of State simply evidence the foreign military sales which the ATF admitted under cross-examination at trial were disclosed and in fact never concealed by plaintiff Technical Ordnance. Moreover, records of all said foreign sales were available to the ATF at the St. Bonifacius facility, and in fact had been reviewed by ATF agents in the past and been pronounced satisfactory,

33. Seventh, "[b]y making false statements and claiming an exemption for all activities relating to the manufacture and sale of explosive materials, either no records are being maintained for the commercial transactions, which are

required by law and fall within the regulation and jurisdiction of ATF, or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations." This statement is demonstrably false for several reasons. First, throughout the course of plaintiff Technical Ordnance's business the ATF in fact had determined that plaintiff Technical Ordnance maintained true records that, taken as a whole, contained all information required by ATF regulations. These records related to both DoD contracts and foreign military sales. Accordingly, any and all ATF allegations that, prior to defendants' wrongful conduct alleged herein, such records were deemed by the ATF to be improper are false and have no basis in fact. Second, this statement comprises pure speculation by the ATF based solely upon the above described allegedly "false statements" which the ATF continually conceded under cross-examination at trial had in fact never been made by plaintiffs. Finally, although not required by law, plaintiff Technical Ordnance did in fact possess an ATF license covering any and all "commercial" activity.

34. The use by the ATF of these and other false statements and/or statements made with a reckless disregard for the truth, was necessary for the ATF to procure a judicial finding of probable cause to search and seize the property of plaintiffs Technical Ordnance and Norman H. Hoffman.

35. In addition to the ATF's false testimony that either no records were being maintained by plaintiffs or that false records were being maintained to conceal improper activity, the search warrants further alleged that:

> on the premises known as Technical Ordnance, Inc. [addresses omitted], including but not limited to all structures and/or buildings, all rooms in said buildings, production areas, temporary storage areas, drying houses, and storage magazines;...there

> is now concealed a certain person or property, namely [SEE ATTACHED ITEMS TO BE SEIZED] which is evidence and instrumentalities of criminal conduct ....

36. In addition to the records that the ATF falsely testified either did not exist or were being maintained to conceal improper activity, the attached list of ITEMS TO BE SEIZED also included:

> Any explosive materials or devices found to be manufactured, maintained, stored, purchased or offered for sale, in violation of Federal Law, and any and all other evidence of criminal offense.

37. The Affidavits made in support of the search warrants alleged that on March 20, 1992, the ATF contacted plaintiff Technical Ordnance at Clear Lake, South Dakota. The ATF proceeded to conduct a compliance inspection of plaintiff Technical Ordnance's storage facilities.

38. During said inspection, the ATF inspected plaintiff Technical Ordnance's bunkers, one of which contained materials that had been part of a DoD Classified Program involving components of the sidewinder missile. The bunker containing missile components remained sealed with a DoD sticker for Classified Programs. Since only authorized DoD representatives possessed the requisite clearance to inspect classified materials, plaintiffs permitted the ATF to look, but not venture, into said bunker.

39. The Affidavits further alleged that one of the explosives bunkers was marked with a Department of Defense sticker and that plaintiff Technical Ordnance denied the ATF access, asserting a DoD exemption based on the storage of classified materials.

40. The Affidavits also alleged that:

currently Technical Ordnance is not engaged in any DoD "Classified Programs." Historically, Technical Ordnance was involved in a "Classified Program" two years ago involving components of the cruise missile. The site had two rooms in the production area and one storage bunker classified for this program. When the program terminated, in December 1991, the restrictions elapsed also.

41. The Affidavits also alleged that:

"[t]herefore your Affiant requests a warrant to search, inspect and seize any and all . . . explosive materials or devices found to be manufactured, maintained, stored, purchased or offered for sale, in violation of Federal Law, which maybe [sic] located at the below-described property...."

The ATF's Unreasonable Search and Seizure

42. On or about October 20, 1992, defendant Moore and the above named government officials designated by the use of the word "Doe," procured search warrants for the premises of plaintiff Technical Ordnance located in St. Bonifacius, Minnesota and Clear Lake, South Dakota.

43. During or about October 1992, approximately twenty-four (24) agents of the ATF and other federal law enforcement agencies raided the St. Bonifacius and Clear Lake facilities of plaintiff Technical Ordnance.

44. The ATF searched all bunkers and magazines at plaintiff Technical Ordnance's facilities, including all areas marked "Classified Program."

45. The ATF failed to find and seized no devices manufactured, maintained, stored, purchased or offered for sale in violation of any federal law.

46. The ATF found that the materials stored in the bunker marked DoD Classified Program did in fact include missile components.

47. Following the search of all magazines, bunkers, and other storage facilities, and the ATF's failure to find any illegal devices concealed by plaintiff Technical Ordnance, the ATF commenced searching plaintiff Technical Ordnance's computer database and record-keeping files for any evidence of such illegal devices.

48. The ATF failed to find any records evidencing such illegal devices.

The ATF's Unlawful Expansion of the Search

49. Following the failure by defendants to find any evidence of criminal conduct on plaintiff Technical Ordnance's premises, defendant Moore stopped the search and conspired, consulted, confederated, combined, and agreed with the above named defendants to expand the scope of the search. Such an expansion was contrary to the laws of the State of South Dakota and contrary to federal law and the rules of the ATF and the United States Government, Defendant Moore and other agents persuaded other officials of the United States present during the search that the ATF was justified in conducting an illegal search.

50. Following their failure to find an illegal device of any kind, and as a face-saving measure, defendant Moore and other ATF agents expanded the search in an attempt to find potential technical violations not described in the Affidavits used to procure the search warrants. In doing so, the ATF searched record-keeping files related but not limited to the following types of transactions:

(i) Transactions that occurred prior to the time that Technical Ordnance acquired its ATF license in 1989, for which all applicable statutes of limitation had expired;

(ii) Transactions that involved third-party brokers or other entities that did not themselves have an ATF license;

(iii) Transactions that involved incomplete records or records containing typographical errors.

51. None of these transactions involved any illegal activity, or any records allegedly maintained to conceal such activity, of the type targeted by the search warrants.

The ATF's Entrapment of Plaintiffs

52. During the fall of 1988, the ATF conceded to plaintiff Technical Ordnance that transactions with certain entities with whom plaintiff Technical Ordnance did business were proper and did not require an ATF license.

53. Moreover, all such transactions were either approved by the ATF itself or involved products not subject to ATF jurisdiction.

54. Despite the fact that said transactions specifically had been approved by the ATF, the defendants searched for records evidencing these very transactions and procured indictments alleging that doing business with such business entities was in fact illegal.

55. During the criminal trial of plaintiffs herein, plaintiffs asserted the defense of entrapment by estoppel to eight counts of the indictments relating to these transactions. The jury acquitted plaintiffs on all eight counts.

The ATF's Suppression of Exculpatory Evidence

56. In addition, the ATF actively searched for records that seemingly were incomplete or contained typographical errors.

57. During the search for records, the ATF did in fact inform plaintiff Technical Ordnance that certain information appeared to be missing from some records.

58. Plaintiff Technical Ordnance informed the ATF that information requested by the ATF was available in other related records. The ATF failed and refused to look at or seize any such related records.

59. The true motive for the searches of record-keeping files was to gather carefully selected materials in order to construct false, unfounded criminal charges against plaintiffs Technical Ordnance and Norman H. Hoffman. In doing so, the ATF deliberately inspected only a few, selected records.

60. The ATF agents were aware that related records other than those selected for search and seizure existed on plaintiff Technical Ordnance's premises. Since those records likely contained exculpatory information, the ATF refused to examine them,

61. In order to establish plaintiff Technical Ordnance's compliance with the law, plaintiffs Technical Ordnance and Hoffman – during the course of the raids – offered to the ATF supplementary records containing exculpatory information, in addition to those that the ATF agents requested for review and seizure. Plaintiffs Technical Ordnance and Hoffman also attempted to explain in detail plaintiff Technical Ordnance's record keeping procedures. The ATF agents executing the search warrants refused to review the related records offered by plaintiffs Technical Ordnance and Norman H. Hoffman.

62. During the searches the above named defendants failed and refused to examine readily available records which would have established that there was no probable cause to believe that plaintiffs Technical Ordnance or Norman H. Hoffman had engaged in any criminal conduct. All prior inspections by the ATF had in fact demonstrated that plaintiff Technical Ordnance's records were in all respects proper. Under cross-examination at trial, defendant Moore admitted that he refused offers to provide such exculpatory information.

63. After the ATF conducted the searches at plaintiff Technical Ordnance's Minnesota and South Dakota facilities,

plaintiff Technical Ordnance continued to attempt to provide the ATF with all pertinent records. The ATF continued to refuse to consider the evidence offered by plaintiff Technical Ordnance.

The ATF's Fraudulent Procurement of the Indictments

64. Notwithstanding the attempts by plaintiffs Technical Ordnance and Hoffman to provide the ATF with exculpatory evidence, the ATF continued to falsely assert that plaintiffs made intentional misrepresentations to the ATF by describing the business of plaintiff Technical Ordnance as consisting exclusively of DoD contracts. The ATF further falsely asserted that plaintiffs Technical Ordnance and Norman H. Hoffman attempted to conceal from the ATF plaintiff Technical Ordnance's foreign military sales.

65. Upon information and belief, the ATF made these and other misrepresentations to the Grand Jury with the intent of procuring indictments against plaintiffs Technical Ordnance and Norman H. Hoffman. Based on the partial evidence selectively obtained by the ATF during the raids and its false assertions regarding plaintiffs, the ATF did in fact procure indictments contrary to fact and law.

66. Upon information and belief, the ATF fraudulently concealed its malicious motive and bad faith conduct after failing to discover supposed but non-existent evidence of criminal conduct.

67. Upon information and belief, as a result of the ATF's suppression and manipulation of evidence, no exculpatory evidence was disclosed to the prosecutor or to the Grand Jury. The Grand Jury therefore returned an indictment without having access to all material facts.

68. The original indictment procured by the above named defendants and giving rise to this claim was served upon plaintiffs Technical Ordnance and Hoffman on or about September 21, 1993. The indictment alleged violations of

Title 18, United States Code, and involved certain implementing regulations promulgated and enforced by the ATF. (United States of America v. Technical Ordnance, Inc. and Norman H. Hoffman, CR 93-10025.) In essence, plaintiffs Technical Ordnance and Hoffman were accused of "criminal" violations of ATF record-keeping requirements.

69. The indictments issued as a direct and proximate result of malicious, bad faith, and unconstitutional conduct of the above named defendants.

70. Defendant Moore and the above named government officials designated by the use of the word "Doe" were active participants in the above described conduct and remained actively involved in the prosecution of plaintiffs Technical Ordnance and Norman H. Hoffman through trial.

71. At all relevant times, said defendants were investigative or law enforcement officers. They were empowered by law to execute searches, seize evidence, and to make arrests for violations of federal law.

72. Said defendants were all acting within the scope of their office or employment at the time of the conduct alleged herein, and these claims arise out of acts or omissions committed by them while acting as investigative or law enforcement officers.

The Jury's Complete Acquittal of Plaintiffs on All 36 Counts

73. On February 18, 1994, in the United States District Court for the District of South Dakota, a jury acquitted plaintiffs Technical Ordnance and its President, Norman H. Hoffman, of each and every one of 36 counts of the indictments unlawfully procured by the above named defendants.

74. A true copy of the jury verdict is attached hereto as Exhibit 1.

75. Before rendering its verdict, the jury submitted a written statement to the Court requesting the opportunity to

make a statement to the public. A true copy of that written statement is attached hereto as Exhibit II.

76. After the jury's discharge, the foreperson advised the local media that the government had introduced no evidence whatsoever of any criminal conduct. The jury could not understand why the ATF had not simply allowed employees of plaintiff Technical Ordnance to help the ATF understand company records and procedures.

77. The following conduct of defendant Moore and the above named government officials designated by the use of the word "Doe" was intentional or grossly careless, negligent, and reckless: i) the intimidation, harassment and injuring of plaintiffs Technical Ordnance and Hoffman; ii) the entrapment of plaintiffs Technical Ordnance and Hoffman into engaging in business transactions that the ATF only later claimed were illegal; iii) the fraudulent testimony used by the ATF to procure findings of probable cause supporting the issuance of the search warrants; iv) the unlawful expansion of the search beyond the scope of the search warrants and the illegal seizure of property under the guise of said warrants; v) the deliberate suppression of exculpatory evidence; vi) the malicious prosecution of plaintiffs Technical Ordnance and Hoffman; and vii) the illegal procurement of indictments against plaintiffs Technical Ordnance and Hoffman. The unreasonable seizures of the property of plaintiffs Technical Ordnance and Hoffman and of their persons was also in violation of the Fourth Amendment of the United States Constitution. Moreover, the unlawful intimidation, harassment, injuring, entrapment, expansion of the scope of the search, and suppression of exculpatory evidence engaged in by defendants deprived plaintiffs of liberty and property without due process of law in violation of the Fourth and Fifth Amendments and other provisions of the United States Constitution.

78. Certain communications by plaintiff Norman H. Hoffman and other employees of plaintiff Technical

Ordnance expressing their frustration and dissatisfaction with defendant Moore and other government officials for their mishandling of inspections, their deliberate flouting of safety rules and regulations promulgated by the DoD, and other unlawful conduct, and expressing their philosophical views concerning the pernicious effect of excessive and duplicative regulation by a government agency with no apparent jurisdiction over the activities of plaintiff Technical Ordnance, were substantial factors in the events leading up to the unconstitutional conduct described above. The unconstitutional intimidation, harassment, indictments, and seizures of the persons of plaintiffs effectively silenced them and deprived them of their Constitutional right to freedom of speech and expression guaranteed by the First Amendment to the United States Constitution.

79. Such actions by the defendants, and each of them, effectively chilled and silenced plaintiffs Technical Ordnance and Hoffman from expressing their political and philosophical views, depriving them of their clearly established Constitutional rights under the First Amendment to the United States Constitution.

80. The conduct of the above named and designated ATF agents was intentional, malicious, willful, wanton, in reckless disregard of the Constitutional rights of plaintiffs Technical Ordnance and Hoffman or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to the fundamental principle that our government is one of laws and not of men.

81. The aforementioned acts were done in a despicable manner with intent to injure and oppress plaintiffs Technical Ordnance and Hoffman and were and are outrageous in character. By reason thereof, plaintiffs Technical Ordnance and Hoffman are entitled to punitive damages.

82. Pursuant to 28 U.S.C. § 2675, plaintiff Technical Ordnance filed an administrative claim with the ATF on October 20, 1994 giving the ATF notice of its claim under the FTCA. More than 6 months have passed since the filing of

that claim. The ATF has taken no action on the administrative claim.

83. Pursuant to 28 U.S.C. § 2675, plaintiff Norman H. Hoffman filed an administrative claim with the ATF on October 20, 1994 giving the ATF notice of his claim under the FTCA. More than 6 months have passed since the filing of that claim. The ATF has taken no action on the administrative claim.

The ATF's Continuing Retaliatory Conduct

84. On November 30, 1995, upon being served with the Complaint in this civil action, defendant Moore showered angry comments upon the process server.

85. Also on November 30, 1995, plaintiff Technical Ordnance received a threatening telephone call from an angry, middle-aged man who, in an aggressive, threatening, and angry tone of voice, shouted out to plaintiff Technical Ordnance "be real careful of what you ship" and immediately hung up.

86. Said threatening telephone call was made shortly after defendant Moore received service of process of the initial Complaint in this civil action,

87. Upon information and belief, defendant Moore placed the threatening telephone call to plaintiff Technical Ordnance on November 30, 1995 in continuation of his policy of implementing a retaliatory campaign of intimidation, harassment, and injury against plaintiffs Technical Ordnance and Norman H. Hoffman.

COUNT I

VIOLATION OF CONSTITUTIONAL RIGHTS

88. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing

and subsequent allegations of this Complaint as if fully set forth herein.

89. At all times related in this Complaint defendant Moore and the above named government officials designated by the use of the word "Doe" acted under color of law and in their capacities as law enforcement officers of the United States of America and within the scope of their employment, but not in good faith. The actions of said defendants were in direct violation of the United States Constitution, statutory law, regulations, and the policies, instructions, and procedures of the ATF and the DoD. Said defendants' conduct violated clearly established Constitutional rights of which a reasonable person would have known.

90. The conduct of the above named defendants was intentional, malicious, willful, wanton, in reckless disregard of the Constitutional rights of plaintiffs or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to the fundamental principle that our government is one of laws and not of men.

91. The political and philosophical views of plaintiffs Technical Ordnance and Hoffman were a substantial factor in the defendants subjecting plaintiffs to such offensive and unconstitutional conduct. Such conduct was in violation of their rights to freedom of speech, freedom of expression, and freedom of association, and invaded the right of the privacy of the plaintiffs by reason of unwarranted intrusions and seizures. All of these Constitutional rights are guaranteed by the First Amendment and other provisions of the United States Constitution.

92. Plaintiffs Technical Ordnance and Hoffman were subjected to such unconstitutional conduct and the infliction of injury, punishment, pain, and penalties, because of their political and philosophical beliefs, and they were denied security to their persons and property because of these beliefs in violation of their Constitutional rights under the First, Fourth, and Fifth Amendments to the United States Constitution.

93. The intimidation, harassment, injury, entrapment, use of fraudulent testimony to procure probable cause findings, unlawful expansion of searches and seizures, suppression of exculpatory evidence, malicious prosecution, and unlawful procurement of indictments to which plaintiffs Technical Ordnance and Hoffman were subjected constituted unreasonable seizures of persons and deprivations of liberty without due process of law, in violation of the Fourth and Fifth Amendments to the United States Constitution.

94. At the time of the incidents alleged above and prior thereto, upon information and belief, the defendants designated herein as JOHN DOE I through JOHN DOE V, unknown named agents of the ATF and/or other officials of the United States Government, or other person or persons unknown to plaintiffs Technical Ordnance and Hoffman at the time of filing this complaint, whose conduct has individually or in concert with others, deprived plaintiffs of their Constitutional rights, knew or in the exercise of reasonable care should have known, that the defendants were engaged in unconstitutional conduct including but not limited to intimidation, harassment, injury, entrapment, use of fraudulent testimony to procure probable cause findings, unlawful expansion of searches and seizures, suppression of exculpatory evidence, malicious prosecution, and unlawful procurement of indictments. Having such knowledge, said defendants failed to properly supervise, order, direct, regulate, communicate with, train, and discipline said agents so that they would avoid such unlawful conduct. Said supervisory directors, officers, and/or agents of the United States Government, consulted and conspired with and aided and abetted the ATF agents and other government officials in depriving plaintiffs of their constitutional rights. Said failures were and are a proximate cause of the injuries to plaintiffs.

95. Such activities on the part of the individual ATF agents, supervisory personnel, defendants designated by the use of the word "Doe," and the United States Government,

acting by and through its officers, directors, employees, and agents, including but not limited to defendant Moore, were the direct and proximate cause of the injuries to plaintiffs Technical Ordnance and Hoffman.

96. The above-named and designated defendants acted with the specific motive and intent to injure plaintiffs Technical Ordnance and Norman H. Hoffman. Said defendants' conduct was intentional, malicious, willful, wanton, in reckless disregard of the Constitutional rights of plaintiffs Technical Ordnance and Hoffman or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to the fundamental principle that our government is one of laws and not of men.

97. The aforementioned acts were done in a despicable manner with intent to injure and oppress plaintiffs Technical Ordnance and Hoffman and were and are outrageous in character. By reason thereof, plaintiffs are entitled to punitive damages.

98. As a direct and proximate result of the wrongful actions and unconstitutional conduct of the above-named defendants, plaintiffs Technical Ordnance and Hoffman were denied their rights to liberty and privacy and their right to hold political and philosophical beliefs contrary to those of the ATF without interference from federal officers acting without probable cause and for an improper purpose, and/or acting to deprive plaintiffs Technical Ordnance and Hoffman of their liberty and property without due process of law.

99. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Technical Ordnance has suffered substantial irreparable harm including without limitation the deprivation of its liberty; damage to its reputation; loss of future business opportunities; and other damages and injuries. Plaintiff Technical Ordnance is entitled to compensatory damages, including without limitation the

costs of defending itself against baseless criminal charges, in an amount in excess of $10,000,000,00.

100. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Norman H. Hoffman has suffered substantial irreparable harm including without limitation the deprivation of his liberty; damage to his reputation; the suffering of great humiliation and severe emotional distress; physical illness; the subjection to ridicule, scorn, and derision by those knowing of this matter; the suspension by the DoD of plaintiff Hoffman from government contracting pursuant to the Suspension and Debarment provisions of Part 9 of the Federal Acquisition Regulation; the loss of future business opportunities; and other damages and injuries. Plaintiff Hoffman is entitled to compensatory damages, including without limitation the costs of defending himself against baseless criminal charges, in an amount in excess of $10,000,000.00.

COUNT II

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

101. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing and subsequent allegations of this Complaint as if fully set forth herein.

102. Plaintiff Technical Ordnance owns the documentary and computer records searched and seized by the above named defendants, as well as the product assemblies and subassemblies searched by defendants. Said defendants, including those designated herein by the use of the word "Doe," unlawfully and unreasonably interfered and disrupted the business activities of plaintiff Technical Ordnance as a consequence of the unconstitutional searches and/or seizures of such records and products described

herein, which interference and disruption caused damages in excess of $5,000.00.

103. Plaintiff Norman H. Hoffman owns the premises used by plaintiff Technical Ordnance, including the buildings and land situated in both St. Bonifacius, Minnesota and Clear Lake, South Dakota. Plaintiff Hoffman leases said buildings and land to plaintiff Technical Ordnance. Plaintiff Hoffman also owns certain private records and effects which were located in his office on the premises of plaintiff Technical Ordnance at the time of the unlawful searches and seizures described herein. The above-named defendants, including those designated herein by the use of the word "Doe," unlawfully and unreasonably deprived plaintiff Norman H. Hoffman of his right to be secure in his property, which deprivation caused damages in excess of $5,000.00.

104. As a direct and proximate result of the conduct of the defendants, and each of them, plaintiffs collectively were deprived of property and their rights to be secure in their property without due process of law in violation of their Constitutional and civil rights under the Fourth and Fifth Amendments to the United States Constitution, and they are entitled to recover a total of $10,000.00, or such other and greater amount of damage as is proved at trial, as compensation for the unlawful damage to their rights and property.

COUNT III

VIOLATION OF CONSTITUTIONAL RIGHTS

DEPRIVATION OF LIBERTY INTEREST

105. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing and subsequent allegations of this Complaint as if fully set forth herein.

106. Plaintiffs Technical Ordnance and Norman H. Hoffman were deprived of their liberty because of the following conduct by the above named defendants: i) defendants' retaliatory campaign of intimidation, harassment, and injuring of plaintiffs Technical Ordnance and Hoffman; ii) the deliberate entrapment of plaintiffs Technical Ordnance and Hoffman into engaging in business transactions that the ATF only later claimed were illegal; iii) the fraudulent testimony used to procure probable cause findings supporting the issuance of the search warrants; iv) the unlawful expansion of the search beyond the scope of the search warrants and the illegal seizure of property under the guise of said warrants; v) the deliberate suppression of exculpatory evidence; vi) the malicious prosecution of plaintiffs Technical Ordnance and Hoffman; and vii) the illegal procurement of indictments against plaintiffs Technical Ordnance and Hoffman.

107. In addition to the unreasonable seizures of the property of plaintiffs Technical Ordnance and Hoffman, the seizure of their persons was also in violation of the Fourth Amendment of the United States Constitution.

108. The wrongful and conspiratorial conduct by the defendants in depriving plaintiffs of their liberty unreasonably, without probable cause, and without due process of law, in violation of the Fourth and Fifth Amendments to the United States Constitution, forseeably inflicted extreme and severe mental and emotional distress, fright, and shock upon plaintiff Norman H. Hoffman. The comments made by defendants were made intending to inflict severe emotional distress, punishments, and penalties upon plaintiff Norman H. Hoffman without due process of law in violation of his rights under the Fourth and Fifth Amendments to the United States Constitution.

109. The unlawful intimidation, harassment, injuring, entrapment, expansion of the scope of the search, and suppression of exculpatory evidence engaged in by defendants deprived plaintiffs of liberty without due process

of law in violation of the Fourth and Fifth Amendments and other provisions of the United States Constitution.

110. The said conduct on the part of the United States Government, acting by and through its officers, directors, employees, and agents, and on the part of the defendants acting in their individual capacities, including but not limited to defendant Moore and other officials of the United States Government, designated herein as JOHN DOE I through JOHN DOE V, were intended, or were substantially certain, to deprive them of their liberty under the Fourth and Fifth Amendments to the United States Constitution, and did in fact cause plaintiff Technical Ordnance substantial irreparable harm including without limitation damage to its reputation; loss of future business opportunities; and other damages and injuries.

111. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Norman H. Hoffman has suffered substantial irreparable harm including without limitation damage to his reputation; the suffering of great humiliation and severe emotional distress; physical illness; the subjection to ridicule, scorn, and derision by those knowing of this matter; the suspension by the DoD of Hoffman from all government contracting pursuant to the Suspension and Debarment provisions of Part 9 of the Federal Acquisition Regulation ("FAR"); the loss of future business opportunities; and other damages and injuries.

112. The actions of the defendants named herein were callous, intentional, malicious, willful, wanton, in reckless disregard of the victims' Constitutional rights or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to the fundamental principle that our government is one of laws and not of men, and in reckless disregard of the rights, privileges and immunities of citizens of the United States of America.

113. The aforementioned acts were done in a despicable manner with intent to injure and oppress plaintiffs and were

and are outrageous in character. By reason thereof, plaintiffs are entitled to punitive damages.

114. As a direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Technical Ordnance is entitled to compensatory damages for deprivation of liberty in an amount in excess of $10,000,000.00,

115. As a direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Norman H. Hoffman is entitled to compensatory damages for deprivation of liberty in an amount in excess of $10,000,000.00.

COUNT IV

CONSPIRACY BY DEFENDANTS TO DEPRIVE PLAINTIFFS OF THEIR CIVIL RIGHTS IN VIOLATION OF 42 U.S.C. § 1985

116. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing and subsequent allegations of this Complaint as if fully set forth herein,

117. Defendant Moore and various of the above named government officials designated by the use of the word "Doe," the exact identity of whom is presently unknown to plaintiffs, while said defendants were acting under color of federal law, knowingly, intentionally and with actual malice, combined, conspired and confederated together to deny and deprive plaintiffs of the equal protection of the laws, their clearly established Constitutional rights to be free to express themselves, to be free from unreasonable seizures of their persons and to be free from denial of liberty and property without due process of law, as guaranteed by the First, Fourth, and Fifth Amendments, and to deny them of their rights to a fair trial by jury under the Sixth Amendment to the United States Constitution. Pursuant to their agreement,

said defendants committed overt acts in furtherance of their conspiracy in that they falsely accused plaintiffs of claiming that they worked only on DoD contracts when in truth and in fact they did not make any such claim. Said defendants well knew that their statements were false because they knew that plaintiffs had in truth and in fact told defendants that plaintiffs engaged in DoD contracts and foreign military sales, and defendants admitted as such during cross-examination at trial.

118. These defendants, and each of them, conspired to lie and did lie about these and other facts for the purpose of incriminating plaintiffs and denying them the equal protection of the laws and depriving them of liberty and property without due process of law.

119. These defendants, and each of them, while said defendants were acting under color of federal law, knowingly, intentionally and with actual malice, combined, conspired and confederated together to deny and deprive plaintiffs of the equal protection of the laws, their rights to be free from unreasonable seizures of their persons, and their rights not to be deprived of liberty and property without due process of law, guaranteed by the Fourth and Fifth Amendments, and to a fair trial under the Sixth Amendment to the United States Constitution, by engaging in intimidating shows of power over plaintiffs, expanding the scope of their search when they discovered no evidence of wrongdoing, and procuring wrongful indictments, thereby effecting the object of their agreement.

120. As a direct and proximate result of the conspiratorial activities of the above named defendants, and each of them, plaintiffs were actually deprived of their clearly established Constitutional rights to the equal protection of the laws; to be free from unreasonable seizures of their persons; to be free from deprivation of liberty and property without due process of law; to have a fair trial by jury in criminal cases, all in violation of their rights under the Fourth, Fifth, and Sixth Amendments to the United States

Constitution and in violation of 42 U.S.C. § 1985. The actions of the defendants resulted in further specific injury to plaintiff Norman H. Hoffman in that the wrongful and conspiratorial conduct by these federal agents forseeably inflicted extreme and severe mental and emotional distress, fright, and shock upon plaintiff Norman H. Hoffman.

121. The actions of the defendants named herein were callous, intentional, malicious, willful, wanton, in reckless disregard of the Constitutional rights of plaintiffs or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to a civilized society, and in reckless disregard of the rights, privileges, and immunities of the plaintiffs who are citizens of the United States of America.

122. The defendants, and each of them, committed other overt acts not alleged in this Complaint, of which the plaintiffs are unaware at this time, and plaintiffs will seek leave to amend this Complaint as the same become known during the course of discovery and at the trial of this matter.

123. As a direct, proximate, and intended result of the conspiracy, plaintiffs were deprived of liberty and property and have been further damaged and deprived of a liberty interest in their reputations and good names.

124. The actions of the defendants named herein were callous, intentional, malicious, willful, wanton, in reckless disregard of the Constitutional rights of plaintiffs or grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to the fundamental principle that our government is one of laws and not of men, and in reckless disregard of the rights, privileges and immunities of citizens of the United States of America.

125. The aforementioned acts were done in a despicable manner with intent to injure and oppress plaintiffs and were and are outrageous in character. By reason thereof, plaintiffs are entitled to punitive damages.

126. As a direct and proximate result of the wrongful actions and conduct of the above named defendants, plaintiff Technical Ordnance was denied its rights to liberty and

privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Technical Ordnance is entitled to compensatory damages for the conspiracy in an amount in excess of $10,000,000.00.

127. As a direct and proximate result of the wrongful actions and conduct of the above named defendants, plaintiff Norman H. Hoffman was denied his rights to liberty and privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Norman H. Hoffman is entitled to compensatory damages for the conspiracy in an amount in excess of $10,000,000.00.

COUNT V

FEDERAL TORT CLAIMS ACT -- MALICIOUS PROSECUTION

128. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing and subsequent allegations of this Complaint as if fully set forth herein.

129. Defendant Moore and the above named officials designated by the use of the word "Doe," acting maliciously with a state of mind that can be characterized by hatred, ill will, or a spirit of revenge, retaliation, and/or a conscious disregard of the rights of plaintiffs, and without probable cause or any reasonable ground on which to base a belief that the government would ultimately prevail on the merits, and with malicious intent:

(iv) caused an indictment to be issued against plaintiffs Technical Ordnance and Norman H. Hoffman; and

(v) caused the prosecution against plaintiffs Technical Ordnance and Norman H. Hoffman to continue to be pursued after indictment through trial at which no evidence of criminal conduct was introduced.

130. The jury acquitted plaintiffs of each and every one of the 36 counts maliciously instituted against them by the defendants.

131. As a direct and proximate result of this malicious prosecution by defendants, plaintiff Technical Ordnance was denied its rights to liberty and privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Technical Ordnance is entitled to compensatory damages for malicious prosecution in an amount in excess of $10,000,000.00.

132. As a direct and proximate result of this malicious prosecution, plaintiff Norman H. Hoffman was denied his rights to liberty and privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above mentioned defendants, and each of them, plaintiff Norman H. Hoffman is entitled to compensatory damages for malicious prosecution in an amount in excess of $10,000,000.00.

COUNT VI

FEDERAL TORT CLAIMS ACT -- ABUSE OF PROCESS

133. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing

and subsequent allegations of this Complaint as if fully set forth herein.

134. Defendant Moore and the above named government officials designated by the use of the word "Doe" utilized the judicial process for an ulterior and improper purpose to accomplish a result other than that which the judicial process is designed to accomplish,

135. Said defendants therefore committed abuse of process against plaintiffs Technical Ordnance and Norman H. Hoffman.

136. As a direct and proximate result of this abuse of process, plaintiff Technical Ordnance was denied its rights to liberty and privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above named defendants, and each of them, plaintiff Technical Ordnance is entitled to compensatory damages for abuse of process in an amount in excess of $10,000,000,00.

137. As a direct and proximate result of this abuse of process, plaintiff Norman H. Hoffman was denied his rights to liberty and privacy without interference from federal officers acting without probable cause and for an improper purpose. As a further direct and proximate result of the wrongful conduct of the above named defendants, and each of them, plaintiff Norman H. Hoffman is entitled to compensatory damages for abuse of process in an amount in excess of $10,000,000.00.

COUNT VII

FEDERAL TORT CLAIMS ACT -- INFLICTION OF EMOTIONAL DISTRESS

138. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing

and subsequent allegations of this Complaint as if fully set forth herein.

139. Defendant Moore and the above named government officials designated by the use of the word "Doe" intentionally, willfully, and with malice engaged in unreasonable and outrageous conduct which caused plaintiff Norman H. Hoffman to suffer extreme emotional distress.

140. Said defendants knew or should have known that their conduct was likely to result in plaintiff Norman H. Hoffman suffering emotional distress sufficient to cause illness or physical injury.

141. As a direct and proximate result of this intentional infliction of emotional distress, plaintiff Norman H. Hoffman has suffered substantial irreparable harm including without limitation damage to his reputation; the suffering of great humiliation and severe emotional distress; physical illness; the subjection to ridicule, scorn, and derision by those knowing of this matter; the loss of future business opportunities; the suspension by the DoD of plaintiff Hoffman from government contracting pursuant to the Suspension and Debarment provisions of the Federal Acquisition Regulation ("FAR"); and other damages and injuries. As a further direct and proximate result of the wrongful conduct of the above named defendants, and each of them, plaintiff Norman H. Hoffman is entitled to compensatory damages for the conspiracy in an amount in excess of $7,000,000.00.

COUNT VIII

EQUITABLE RELIEF

142. Plaintiffs repeat, reallege, and incorporate by reference as though fully set forth herein all of the foregoing and subsequent allegations of this Complaint as if fully set forth herein.

143. Defendant Moore and other defendants named above involved in the conspiracy and implementation against plaintiffs Technical Ordnance and Norman H. Hoffman of the illegal, retaliatory campaign of intimidation, harassment, injury, malicious prosecution, and other improper conduct, continue to act as investigative or law enforcement officers empowered by law to execute searches, seize property, and to make arrests for violations of federal law, even though their procurement of probable cause findings through fraudulent testimony and other conduct was established at trial to have constituted conduct that was illegal and which deprived these citizens of their constitutionally protected rights.

144. At all times relevant to this Complaint, including up to and including the present date, plaintiffs held and hold certain philosophical beliefs about the structure of our society and government, including the strongly held belief that duplicative, inefficient, and inconsistent regulations implemented by competing government agencies with overlapping jurisdictions is detrimental to our free enterprise system.

145. Upon information and belief, plaintiffs allege that it is and has been the intent and policy of defendant Moore and other named defendants herein to disrupt, intimidate, harass, threaten, entrap, and otherwise attempt to injure plaintiffs in violation of their rights to freedom of speech and expression guaranteed by the First Amendment to the United States Constitution, and in violation of their rights to be secure in their liberty and property as guaranteed by the Fourth and Fifth Amendments to the United States Constitution.

146. In furtherance of defendants' intentional conduct, the plaintiffs suffered deprivation of their constitutionally protected rights to freedom of speech and security in their persons, liberty, and property, as more particularly described elsewhere in this Complaint.

147. Unless this Court enters an injunction against the continuation of the authorized policies described above, the

plaintiffs and others similarly situated are in danger of sustaining substantial, immediate, and irreparable injuries in the future as a result of these described policies.

148. The plaintiffs' remedies at law are inadequate to protect them against the deprivations of fundamental rights and other injuries that are substantially certain to occur from the defendants' ongoing retaliatory campaign of intimidation and harassment.

JURY DEMAND

PLAINTIFFS DEMAND A JURY TRIAL OF ALL ISSUES SO TRIABLE

DEMAND FOR ATTORNEYS' FEES AND COSTS

149. Plaintiffs are entitled to recover their attorneys' fees and costs from the defendants under pertinent provisions of state and federal cases or statutory law, including but not limited to 42 U.S.C. § 1988, the Equal Access to Justice Act, 28 U.S.C. § 2412, and Rule 54 of the Federal Rules of Civil Procedure.

GENERAL ENTITLEMENT TO PUNITIVE DAMAGES

150. The actions of the defendants, and each of them, as related herein in all Counts were malicious, deliberate, oppressive and outrageous, and intentional or in reckless disregard of the rights of the plaintiffs and in reckless disregard of the probable consequences of their actions, entitling plaintiffs to punitive damages as to each Count.

GENERAL INCORPORATION BY REFERENCE

151. Each and every fact or allegation set forth in this Complaint is incorporated by reference and made a part of every Count in the Complaint.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs Technical Ordnance, Inc. and Norman H. Hoffman pray for judgment as follows:

1. For an order of the Court prohibiting the defendants, and each of them, from engaging in a policy which seeks to intimidate, disrupt, harass, threaten, entrap, and otherwise attempt to injure plaintiffs Technical Ordnance and Norman H. Hoffman, in violation of these citizens' rights to freedom of speech and expression and to security in their persons, liberty, and property, and to their rights to a fair trial, all as guaranteed by the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution.

2. As to Count I, that defendant Moore and the above named government officials denominated as JOHN DOE I through JOHN DOE V are liable to plaintiffs Technical Ordnance and Norman H. Hoffman, and each of them, for damages in an amount in excess of $10,000,000.00.

3. As to Count II, that defendant Moore and the above named government officials denominated as JOHN DOE I through JOHN DOE V are liable to plaintiffs Technical Ordnance and Hoffman for damages in an amount in excess of $10,000.00.

4. As to Count III, that defendant Moore and the above named government officials denominated as JOHN DOE I through JOHN DOE V are liable to plaintiffs Technical Ordnance and Norman H. Hoffman, and each of them, for damages in an amount in excess of $10,000,000.00.

5. As to Count IV, that defendant Moore and the above named government officials denominated as JOHN DOE I through JOHN DOE V are liable to plaintiffs Technical Ordnance and Norman H. Hoffman, and each of them, for damages in an amount in excess of $10,000,000.00.

6. As to Count V, that defendant United States of America is liable to plaintiffs Technical Ordnance and

Norman H. Hoffman, and each of them, for damages in an amount in excess of $10,000,000.00.

7. As to Count VI, that defendant United States of America is liable to plaintiffs Technical Ordnance and Norman H. Hoffman, and each of them, for damages in an amount in excess of $10,000,000.00.

8. As to Count VII, that defendant United States of America is liable to plaintiff Norman H. Hoffman for damages in an amount in excess of $7,000,000.00.

9. Awarding attorneys' fees, costs, and such other and further legal or equitable relief as the Court may deem just and equitable.

Dated: April 8, 1996

FAEGRE & BENSON LLP

/s/

Jeff H. Eckland (#139920)
William L. Roberts (#212763)
David J.F. Gross (#0208772)
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: 612/336-3000

GUNDERSON, EVENSON & BOYD

Dennis D. Evenson
415 Third Avenue S.
P.O. Box 977
Clear Lake, SD 57226-0977
Telephone: 605/874-2111

Attorneys for Plaintiffs Technical Ordnance, Inc. and Norman H. Hoffman

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

* * * * * * * * * * * * * * *

TECHNICAL ORDNANCE, INC., and NORMAN H. HOFFMAN,	
Plaintiffs,	CIV. 95-1039
-vs-	Aberdeen, South Dakota
UNITED STATES OF AMERICA, et al.,	March 19, 1997
Defendants.	10:00 A.M.

* * * * * * * * * * * * * * *

TRANSCRIPT OF MOTIONS HEARING

BEFORE THE HONORABLE CHARLES B. KORNMANN, UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For Plaintiffs: MR. DENNIS D. EVENSON
Gunderson, Evenson & Boyd
P. O. Box 977
Clear Lake, South Dakota 57226
-and-
MR. JEFF H. ECKLAND
Faegre & Benson
2200 Norwest Center

90 S. 7th St.
Minneapolis, Minnesota 55402

For Defendants: MR. R. JOSEPH SHER
U. S. Department of Justice
Torts Branch Civil Division
P. O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

Court Reporter: Richard A. Christoffer
455 Federal Building
225 S. Pierre Street
Pierre, South Dakota 57501

* * *

[Excerpt from pages 18-23]

Secondly, not only did they know about the exact nature of the business, but they knew that there were records that indicated the nature of that business and they were in conformance with ATF regulations. And we've pled that. And at the trial in this matter we will introduce a memorandum internal to the ATF dated October 31st of 1991, again about a year before the search, 1992, quote, this is John Kodadek from the ATF, "When taken as a whole, Tech Ord's records contain all of the information required by Part 55." And his chief responded to that memo by saying, "Well, it appears that Technical Ordnance is maintaining records of acquisition and disposition. Also their explosive storage magazines comply with ATF requirements. Although Tech Ord's record keeping and storage of explosive materials are not segregated from other operations, we don't see any violation on the part of this company." That's October of 1991.

And, yet, given all of that, Special Agent Moore comes along and writes an affidavit, and certifies to it, and takes conversations out of context which, surprisingly, he does accurately quote in the dense language of the boilerplate of the affidavit, but then he takes those very quotes out of context when he states a violation. And he combines those fraudulent statements with statements claiming that the State Department had records of all sorts of foreign sales to foreign military institutions and governments. And the ATF knew that, number one. But by distorting Mr. Hoffman's and Technical ordnance statements to say that they were not doing any foreign exports, with the evidence that they were, he created the perception that they were covering it up, and he was also creating the perception that there was something wrong with what they were covering up.

And what's fascinating about this case is that Agent Moore and others at the ATF created this illusion for the DOD. Of course, the DOD regulates and inspects Mr. Hoffman on a regular basis. But what happened is that Mr. Moore would take these statements out of context that he had been told by Mr. Hoffman and Technical Ordnance, convey those to the DOD, and the DOD says, geez, he's claiming he only does DOD business, that's not true. But that's not what Mr. Hoffman and Technical Ordnance said.

In addition, he led, with respect to an underlying crime, he led the DOD to believe that Technical Ordnance did not have an ATF license. When every transaction involved and every single count of this indictment occurred during the time that Tech Ord did, in fact, have a manufacturing license from the ATF. In fact, on the last day of the government's case, on a Friday afternoon, the government called Randy Heider from DCIS and within the first few questions to him it was established to the shock of not only everyone in the courtroom, but of his own lawyers for the government, that he did not know that Technical Ordnance had a license at the time of the raid. He was under the misapprehension that

they did not have a license. And Doug Moore did not correct that misapprehension.

THE COURT: Let me ask you something about this Moore affidavit.

The Amended Complaint alleges that the affidavit falsely stated that Technical Ordnance does only DOD work, contract work. I don't read that affidavit that way. You look at pages 2 and 3, they quote Mr. Hoffman as claiming on March 20, 1992 that the operation, quote, "currently and currently involves only Department of Defense contracts", end quote, and quote "is not currently providing explosive materials to foreign customers or governments", end quote. In other words, I don't see anything in that affidavit that states that Technical Ordnance does only DOD work. Now, if I'm missing something, you tell me that.

MR. ECKLAND: Thank you, Your Honor.

May I approach the board?

THE COURT: Surely.

MR. ECKLAND: I have blown up, in fact, that very language.

If I may have standing permission, Judge, to move from here to there?

THE COURT: Surely. You can walk around any place you want to in the well.

MR. ECKLAND: What I have done, Judge, the title of this board is Affidavit - Probable Cause Attachment. And what I'm going to do is highlight First the section that you just read from, page 2 through 3.

"On March 20th, 1992, he", Hoffman, "asserts that because his operation currently involves only Department of Defense contracts that ATF has no jurisdiction and his company's activities are exempt under Title 27." Okay?

THE COURT: Okay.

MR. ECKLAND: Now that is correctly transcribed. And, in fact, Mr. Hofmann, the evidence will show, also said other things. He said -- he didn't say, I currently don't only do Department of Defense work, but we also do foreign

military sales, and we're not currently doing those, or commercial sales to foreign governments, we're not doing that. But this is what he quoted in his affidavit.

Then look at the violation section. Paragraph 3 on page 7. The violation that he concludes is that, "On March 20th, 1992, Hoffman stated that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping."

THE COURT: In other words, he left out the word "currently".

MR. ECKLAND: Yes, he did not say currently. And Mr. Hoffman never denied that the company engages in foreign military sales. He just said on this particular day you guys were here we ran off a computer printout list of all our jobs and they were all DOD. If they come on a day when there was an assembly line in operation for a contract for a foreign military sale, as in the past, like in 1990, they would have been permitted to look at those records. But on that day they were not there. But that's not what he told the DOD. He told Donna Macholda, and in his violation of his affidavit he said that they denied ever doing any commercial sales and that they only did DOD. And that he combined this, paragraph 3, with language immediately below that on page 7 indicating that documents from the U.S. Customs Service indicate that Tech Ord has done over $11 million of business since 1983. But he doesn't say that the attachment, this same affidavit, will show that in the time in question, March 20th, 1992, there were no foreign military sale contracts being performed at that time. But when you take off "currently" and say he says he's only doing DOD contracts, and then combines that with obvious evidence of sales to foreign companies that Mr. Hoffman and Tech Ord have never denied, he creates the illusion that they're covering up everything but the DOD business. And, therefore, they targeted in the search warrant the fact that there would be either no records indicative of these foreign military sales or that there would be false records. In other words, records

that hid the foreign military sales under the lucrative DOD sales. And they never found that. They knew before they went in there that they wouldn't find them. Because they weren't there. They already concluded they were fine.

He does a similar thing on pages 2 to 3 of the affidavit. He says, "On March 20th, 1992, Hoffman stated that his company has discontinued manufacturing destructive devices and is not currently", on March 20th, "providing explosive materials to foreign customers or governments." That's not what Mr. Moore says to the DOD. It's not what he says to the magistrate judge when he goes in for a probable cause finding. On the section, probably the only section that anyone read because it's a section that itemizes the violations and everything is material to the alleged finding of probable cause, in paragraph 3 he says, "On March 20th Hoffman stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments." He was misleading the DOD. He was misleading the judge into thinking that Mr. Hoffman and Tech Ord were claiming they only did DOD business.

MEMORANDUM
UNITED STATES DISTRICT COURT

Date: October 29, 1999
To: Counsel
Re: Technical Ordnance, et al. v. U.S.A., CIV. 95-1039
From: Judge Charles B. Kornmann

Yesterday, my Order denying the motions for summary judgment was sent to the clerk for filing and distribution. I am told (although I have not seen it) that a notice of appeal is to be filed today. I have under consideration a motion for sanctions for failure of the plaintiffs to comply with Rule 26 disclosures. Counsel for plaintiffs should respond immediately to that motion with a full explanation and any suggestions you might have to prevent any prejudice to the defendants.

While I do not believe there is any legal basis at all for an appeal (given that the Court has only determined that factual issues should be resolved at trial), we nevertheless have a scheduling problem. Do the plaintiffs wish to proceed with the federal tort claims act trial to the court, leaving the Bivens claim for later, assuming, of course, that the Court of Appeals would not find that qualified immunity exists as a matter of law?

Keep in mind that today is the deadline for submission of jury instructions and the other documents required by the scheduling order entered long ago. As you know, the Order provides for such filings 10 working days before trial. Anything filed after today is late.

/s/
CHARLES B. KORNMANN
UNITED STATES DISTRICT JUDGE
United States Courthouse

102 Fourth Avenue SE, Suite 408
Aberdeen, SD 57402

cc: Clerk's file

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

MICHAEL E. GANS
Clerk of Court

VOICE (314) 539-3600
ABBS (800) 652-8671
ls.wustl.edu/8th.cir

December 29, 1999

Mr. R. Joseph Sher
U.S. DEPARTMENT OF JUSTICE
Torts Branch; Civil Division
P.O. Box 7146
Ben Franklin Station
Washington, DC 20004

Re: 99-4334SDP Technical Ordnance vs. USA

Dear Counsel:

We have received certified copies of the notice of appeal and docket entries from the Clerk of the United States District Court. The appeal has been docketed today under the number indicated.

This appeal has been sent to a panel of judges for review. You will be notified of any decision entered by the Court or whether a briefing schedule will be established.

(5052-010199)

Sincerely,

/s/

Michael E. Gans
Clerk of Court

jab

Enclosure(s)

cc: Ted L. McBride
Helene M. Goldberg
Kristy L. Parker
Edward Himmelfarb
Dennis D. Evenson
Jeff Howard Eckland
William L. Roberts
David J. Gross
Raymond B. Eby
Richard Christoffer, Court Reporter
Joseph A. Haas, Clerk
District Court/Agency Case Number(s): CIV 95-1039

December 29, 1999
Case Number: 99-4334

District Court/Agency Case Number(s): CIV 95-1039

TECHNICAL ORDNANCE, INC.; NORMAN H. HOFFMAN

Plaintiffs - Appellees

v.

UNITED STATES OF AMERICA; DOUGLAS MOORE, Special Agent, The Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; OTHER UNKNOWN ATF AGENTS JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, True Names Unknown

Defendants - Appellants

(5072-010199)

CERTIFICATE PERTAINING TO FOREIGN INTERESTS

(Type or print all answers)

Form Approved
OMB No. 0704-0024
Expires Apr 30, 1994

PENALTY NOTICE

Failure to answer all questions, or any misrepresentation (by omission or concealment, or by misleading, false or partial answers) may serve as a basis for denial of clearance for access to classified Department of Defense information. In addition, Title 18, United States Code 1001, makes it a criminal offense, punishable by a maximum of five (5) years imprisonment, $10,000 fine, or both, knowingly to make a false statement or representation to any Department or Agency of the United States, as to any matter within the jurisdiction of any Department or Agency of the United States. This includes any statement made herein which is knowingly incorrect, incomplete or misleading in any important particular.

PROVISIONS

1. This report is authorized by the Secretary of Defense pursuant to authority granted by Executive Order 10865. While you are not required to respond, your eligibility for a facility security clearance cannot be determined if you do not complete this form. The retention of a facility security clearance is contingent upon your compliance with the requirements of DoD 5220.22-M for submission of a revised form as appropriate.

2. When this report is submitted in confidence and is so marked, applicable exemptions to the Freedom of Information Act will be invoked to withhold it from public disclosure.

3. Complete all questions on this form. Mark "Yes" or "No" for each question. If your answer is "Yes" furnish in full the complete information under "Remarks."

QUESTIONS AND ANSWERS

	YES	NO
1. Do foreign interests own or have beneficial ownership in 5% or more of your organization's securities?		X
2. Does your organization own any foreign interest in whole or in part?		X
3. Do any foreign interests have positions, such as directors, officers, or executive personnel in your organization?		X
4. Does any foreign interest control or influence, or is any foreign interest in a position to control or influence the election, appointment, or tenure of any of your directors, officers, or executive personnel?		X
5. Does your organization have any contracts, agreements, understandings or arrangements with a foreign interest(s)?	X	
6. Is your organization indebted to foreign interests?		X
7. Does your organization derive any income from designated countries or income in excess of 10% of gross income from non-designated foreign interests?		X
8. Is 5% or more of any class of your organization's securities held in "nominee shares," in "street names" or in some other method which does not disclose the beneficial owner of equitable title?		X
9. Does your organization have interlocking directors with foreign interests?		X
10. Are there any citizens of foreign countries employed by or who may visit your facility (or facilities) in a capacity which may permit them to have access to classified information?		X
Does your [illegible] have any foreign [illegible] not otherwise covered in your		

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Section J:

Ministry of Defense Gov't of Israel Tel Aviv Israel Product: Electric Squib Application Military	1 Gross Revenue: 1%
Canadair Ltd., Montreal P.O. Box 6087 Montreal, CANADA H3C3 Product: Roofing Line Cutter Application: Military	1 Gross Revenue: 1%
Irvin Industries Canada Ltd P.O. Box 280 479 Central Ave Fort Erie, Ontario L2A 5N8 Product: Roofing Line Cutter Application: Military	1 Gross Revenue: 1%
The United Kingdom Ministry of Defence C3/AML32AE St Georges Court 14 New Oxford Street, London WC2A 1EY Product: Roofing Line Cutter Application: Military	1 Gross Revenue: .1%

CERTIFICATION

I CERTIFY that the entries made by me above are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

WITNESS:

March 15, 1990
(Date Certified)

By Norman B. Hoffman
Norman B. Hoffman

Technical Ordnance, Inc.
(Contractor)

President
(Title)

654 Industrial Blvd.
Waconia, MN 55387
(Address)

NOTE: In case of corporation, witnesses not required but certificate below must be completed. Type or print names under all signatures.

NOTE: Contractor, if a corporation, should cause the following certificate to be executed under its corporate seal, provided that the same officer shall not execute both the agreement and the certificate.

CERTIFICATE

I, Ann M. Hoffman certify that I am the Secretary of the corporation named as Contractor herein; that Norman B. Hoffman who signed this certificate on behalf of the Contractor, was then President of said corporation; that said certificate was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

Ann M. Hoffman 3-15-90
Signature and Date

(Corporate Seal)

DD Form 4415 Reverse, JUN 87

AO 93 (Rev. 5/85) SEARCH WARRANT ON WRITTEN AFFIDAVIT

United States District Court	DISTRICT: South Dakota
UNITED STATES OF AMERICA V. Norman Hoffman and Technical Ordnance, Inc.	DOCKET NO. / MAGISTRATE'S CASE NO.: 92-164 TO: Special Agents of the Bureau of Alcohol, Tobacco and Firearms

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (name(s) person(s)) (on the premises known as) Technical Ordnance, Inc., Clear Lake, South Dakota including but not limited to all structures and/or buildings, all rooms in said buildings, production areas, temporary storage areas, drying houses, and storage magazines.

in the Judicial District of South Dakota there is now being concealed certain property, namely

1) Books, records, receipts, invoices, notes, contracts, ledgers and other papers relating to the transportation, ordering, purchasing, sale, transfer, export, and manufacture of explosive materials, explosive devices, explosive activated tools or devices and military explosive devices, detonators, fuses, etc..

2) Electronic equipment such as computers, telex machines, facsimile machines and computer software, tapes and discs and contents therein, containing the information generated by the aforementioned electronic equipment and communication devices.

3) Any explosive materials or devices found to be manufactured, maintained, stored, purchased or offered for sale, in violation of Federal Law, and any and all other evidence of a criminal offense.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

YOU ARE HEREBY COMMANDED to search on or before Friday, October 23, 1992 (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or night)* and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to Frank P. Gibbs, U.S. Magistrate, Sioux Falls, South Dakota as required by law.

U.S. Judge or Magistrate

NAME OF AFFIANT	SIGNATURE OF JUDGE** OR US MAGISTRATE	DATE/TIME ISSUED
Douglas C. Moore	Frank P. Gibbs	10/19/92 4:30 pm

*If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable cause therefor.

**United States Judge or Judge of a State Court of Record.

6370

AFFIDAVIT
Probable Cause Attachment

I, Douglas C. Moore, after being duly sworn, state the following based on information and belief.

I am a special agent with the Bureau of Alcohol, Tobacco and Firearms (ATF), United States Department of the Treasury, and have been so employed for the past sixteen (16) years. As part of my duties, I have investigated violations of the National Firearms Act (26 U.S.C. Section 5801 et seq.) and the Explosives Control Act (18 U.S.C. Section 841 et seq.) relating to the manufacture, acquisition, transportation, storage and possession of explosives, explosive materials and destructive devices. Through the course of my employment, I have become familiar with the provisions of the Explosives Control Act relating to the records persons licensed under that Act are required to keep. Based on my training and experience, as well as on information from other sources, I know that section 842(f) of the Explosives Control Act provides that it is unlawful for any explosives licensee to manufacture, import, purchase, distribute, or receive explosive materials without making the records that are required by the regulations issued under the Act. These records include, but are not limited to, the records required to be maintained by 27 C.F.R. Section 55.123.

This affidavit is in support of search warrant for the premises of Technical Ordnance, Incorporated, located County Road 7, Clear Lake, South Dakota. This affidavit is based on my own knowledge and observations, as well as on information provided by others in this investigation.

Technical Ordnance, Inc. is currently licensed as manufacturer of explosives and explosive materials in South Dakota and Minnesota. Technical Ordnance currently possesses ATF Explosives Licenses 3-SD-019-20-0D-00050 and 3-MN-027-20-3D-00303. These licenses expire in April 1993. Norman Hoffman is the president and owner of

Technical Ordnance, Inc. According to records and information in ATF possession, a portion of Technical Ordnance's business is conducted in contract with the Department of Defense.

On March 6, 1992, I was assigned to investigate an explosion which occurred on January 21, 1992, at Technical Ordnance, Inc., County Road 7, Clear Lake, South Dakota. Next, I contacted ATF Licensing Section, Atlanta, Georgia, and learned that Technical Ordnance Inc., is licensed under number 3SD019200D00050, which expires on April 1, 1993. The owner and president of the company is identified as Norman Hoffman.

On March 9, 1992, I contacted Inspector Rob Schellhorn, ATF Compliance, St. Paul, Minnesota, who conducted the last compliance inspection of Technical Ordnance on May 17, 1990. Schellhorn advised that Technical Ordnance is an explosives storage facility, however; the manufacturing process itself of the materials involved for the Department of Defense is exempt from ATF regulation. Schellhorn cited Technical Ordnance for a storage violation regarding exposed ferrous metal inside the explosives magazines.

On March 10, 1992, I contacted Steve Wilmas, Defense Contracts Management Administration Office (DCMAO), St. Paul, Minnesota, regarding the Department of Defense contracts awarded to Technical Ordnance Inc. Wilmas advised that Technical Ordnance is actually a subcontractor for the prime DOD contractor Waltham Clock Company. Wilmas advised the contractors are required to notify them within three hours of an industrial accidental explosion. Technical Ordnance apparently did not comply with this DOD regulation and a letter has been forwarded to Norman Hoffman of Technical Ordnance, requesting that he formally declare when and to whom he made notifications concerning the January 21, 1992, explosion. Wilmas arranged for me to speak with Mike Peltier, Safety Officer, DCMAO, St. Paul, Minnesota, for more details concerning Technical Ordnance. Peltier advised that on January 22, 1992, his office received

notification via FAX from Technical Ordnance, that not one but three accidental explosions had taken place. According to Peltier, the FAX indicated that the first explosion occurred on January 16, 1992, at which time employees were working with a substance identified as Tetrazene. Tetrazene was being heated in an oven at 100 degree celsius and apparently other unidentified materials may have been present in the oven; ultimately the oven exploded and when the oven door blew off, it struck two employees causing injuries. The facility apparently had conflicting data as to what the proper temperature setting (60 degrees Celsius) should be for this process with Tetrazene and the 100 degree Celsius caused the explosion. This incident is an accidental industrial explosion and was not reported to ATF. On January 20, 1992, the facility was manufacturing detonators utilizing the explosive materials HMX and NOL-130. During the process a quantity of the NOL-130 powder was subjected to friction and or pressure and an explosion resulted causing shrapnel injuries sustained by one employee. Again this incident is an accidental industrial explosion and was not reported to ATF. On January 21, 1992, the facility was once again manufacturing detonators utilizing the explosive materials HMX and NOL-130. During the process a quantity of the NOL-130 powder was subjected to friction and or pressure and an explosion resulted causing injuries sustained by one employee. Again this incident is an accidental industrial explosion.

On March 20, 1992, Inspector Kim Kratochvil, ATF St. Paul, Minnesota, and I contacted Technical Ordnance Inc., Clear Lake, South Dakota. We met with owner Norman Hoffman and John Yuhas and advised them that our presence was for two purposes, to discuss the recent accidental explosions and to perform a follow-up compliance inspection on the explosives bunkers and inventory. Hoffman acknowledged that the three explosions occurred, however; he asserts that because his operation currently involves only Department of Defense contracts, that ATF has

no jurisdiction and his companies activities are exempted under Title 27, CFR, Section 55.141. Hoffman stated that his company has discontinued manufacturing destructive devices and is not currently providing explosive materials to foreign customers or governments. When asked if your entire operation falls under the purview of the Department of Defense exemption, why do you maintain an ATF explosive license; Hoffman responded because they (ATF) made me get an explosive license. According to reports in the compliance file on Technical Ordnance, in the past the activities of the company involving the manufacture of the destructive devices, sales to foreign customers or governments and the acquisitions and storage of explosive materials for their manufacturing process, required that they obtain an ATF explosive license. The only exception is in the case of a Government owned and operated facility, which Technical Ordnance is not, they are a privately owned commercial enterprise. Yuhas advised that he did contact ATF Inspector Glen Tischler, St. Paul, Minnesota, regarding the January 21, 1992, explosion and was informed that because of the DOD exemption, no report to ATF was necessary. Yuhas provided Inspector Kratochvil with a copy of a hand written note concerning this conversation with Inspector Tischler.

Inspector Kratochvil accompanied by Norman Hoffman proceeded to conduct a compliance inspection of the storage facilities. One of the explosives bunkers was marked with a Department of Defense sticker and Hoffman denied Inspector Kratochvil access to this area, once again asserting a DOD exemption based on the storage of classified materials.

Also on this date, I reviewed the ATF Compliance file on Technical Ordnance and made copies of the following documents: (1) letter dated February 14, 1989, from the law firm Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis; Minnesota, outlining seven points regarding how the Federal explosives laws apply to Technical Ordnance; (2) ATF Compliance report dated April

17, 1990, by Inspector Rob Schellhorn regarding Technical Ordnance and their assertion of exemption status under 27CFR part 55.141 (a) (5); (3) letter dated July 25, 1990, from Technical Ordnance to ATF Compliance in response to Inspector Schellhorn's report; and (4) letter dated August 7, 1990, from ATF Compliance, St. Paul, Minnesota, to Technical Ordnance clarifying the exemption under 27CFR part 55.141 (a) (5) and how it does or does not apply to the activities conducted by Technical Ordnance. Copies of these documents are attached to this affidavit as exhibits.

On March 24, 1992, I contacted Donna Marcholda, Security Specialist, DIS, St. Paul, Minnesota, and apprised her of our contact with Technical Ordnance. Marcholda advised that it's her understanding that Technical Ordnance has a minimum of DOD contract work and that the majority of their products are foreign and commercial sales, not as portrayed by Hoffman. Marcholda advised that she would research this for clarification and inform ATF accordingly. Marcholda advised that during her last compliance inspection of Technical Ordnance, she found the company in total non-compliance, because she found the inventory and accountability so confusing she found it impossible to sort out the situation. Also on this date, I contacted Special Agent Keith Petersen, DCIS, St. Paul, Minnesota, and apprised him of our contact with Technical Ordnance. Petersen also advised that Technical Ordnance has a minimum of DOD contracts and as he understands it, the bulk of their business involves sales to foreign customers and domestic commercial ventures. Petersen advised that he would query U.S. Customs for a recent printout concerning the foreign sales by Technical Ordnance.

On April 15, 1992, I contacted the NFA Branch, Washington, D.C., and queried the names Norman Hoffman and Technical Ordnance, Inc., and the registration status check proved negative. The ATF Compliance Office, St. Paul, Minnesota, file on Technical Ordnance indicates no requests for an NFA exemption regarding the manufacturing

activities of the company. Also on this date, I contacted ATF, Special Tax Processing Unit, Cincinnati, Ohio, and queried the names of Norman Hoffman and Technical Ordnance, Inc., and was advised that ATF has no record of an employee identification number (EIN) issued by IRS for this company.

On April 23, 1992, I was contacted by Special Agent Keith Petersen, DCIS, St. Paul, Minnesota, and he advised that he has received the export printouts from Customs, concerning a State Department license issued to Technical Ordnance, Inc. Petersen advised the printout indicates recent exports by Technical Ordnance to Israel and Germany as foreign commercial sales. Petersen advised that he would forward copies of these printouts to me.

On April 27, 1992, I received the U.S. Customs export list of shipments by Technical Ordnance to various foreign countries from February 20, 1988, thru March 4, 1992. These transactions total in excess of $7,000,000.00 in sales to twelve foreign countries. A copy of the list pertaining to these transaction is attached to this affidavit as exhibit #5. I also received a copy of the U.S. State Department form DSP-9, Application for Registration, number 0391-3875, with the Office of Defense Trade Controls, dated June 7, 1991, issued to Technical Ordnance for exportation to foreign countries (Exhibit 6). I also received a copy of DD form 441 S, Certificate Pertaining to Foreign Interests, dated March 13, 1990, regarding contracts with foreign interests as relates to Technical Ordnance (Exhibit 7).

On July 8, 1992, I made preliminary contact with Atlas Powder Company, DuPont, Trojan Powder Company; Explosives Technology, Inc., Austin Powder Company, Ireco and Hercules, regarding possible sales of explosive materials to Technical Ordnance over the past five years.

DuPont responded by faxing copies of invoices of purchases by Technical Ordnance during 1988 and 1989, totaling 900 lbs. of lead azide. Trojan responded indicating form 1987 thru 1990, they shipped a total of 1530 lbs. of PETN and 5050 lbs. of HMX to Technical Ordnance. To date,

Atlas has not responded and the other companies contacted indicated no shipments have been made to Technical Ordnance.

On July 9, 1992, Hercules responded and faxed invoices of purchases by Technical Ordnance during 1986 and 1991. On December 8, 1986, Hercules under government contract no. N00174-86-C-0111, shipped 45 lbs. of HPC-60 propellant to Technical Ordnance. On April 9, 1991, Hercules under government contract no. DAAA09-90-C-0474, shipped 2010 lbs. of HPC-1 propellant to Technical Ordnance.

On August 10, 1992, I met with ATF Inspector Kim Kratochvil, St. Paul, Minnesota, and Special Agent Randy Heider, DCIS, St. Paul, Minnesota, at the Sioux Falls, South Dakota, ATF Office regarding this investigation. Agent Heider provided ATF with copies of documents relating to six DOD contracts with Technical Ordnance as a prime contractor. The monetary value of these six contracts is between 5 and 6 million dollars. Agent Heider advised that additional inquiries are being researched to determine historically how many contracts Technical Ordnance has been involved in during the past five years, as either a prime contractor or a sub-contractor. Agent Heider advised that once these documents are assembled they will be made available to ATF. Agent Heider advised that the updated export list pertaining to foreign shipments by Technical Ordnance has not yet been received from Customs, but will also be made available to ATF.

On August 26, 1992, I was contacted by Special Agent Randy Heider, DCIS, St. Paul, Minnesota, who advised that on September 8, 1992, a meeting has been scheduled for ATF Inspector Kim Kratochvil to confer with DOD personnel. Kratochvil will meet with the Quality Inspector, Financial Inspector, Safety Engineer and the Industrial Specialist associated with the DOD contracts pertaining to Technical Ordnance.

Heider advised that he was able to determine that currently Technical Ordnance is not engaged in any DOD

"Classified Programs". Historically, Technical Ordnance was involved in a "Classified Program" two years ago involving components of the cruise missile. The site had two rooms in the production area and one storage bunker classified for this program. When the program terminated, in December 1991, the restrictions elapsed also. Heider further advised that even if the "Classified Program" was in affect, advance clearance can be obtained for ATF personnel or a DCIS agent can accompany ATF and authorize the inspection on site.

Preliminary indications are that Technical Ordnance has had 134 requests for exports. According to Heider, there is a current program whereby a foreign government can through the State Department contract with an American company for munitions, which would qualify as a foreign military sale. This type of FMS transaction is classified accordingly on the state Department export license. From the State Department printout it can be determined, which transactions are FMS and which are commercial sales and then this list can be compared to the Customs export list. This type of FMS falls within the purview of ATF regulation because the exemption applies to only those sales by the U.S. government to a foreign government. In this instance, the transaction must be approved by the U.S. State Department, but the contract is with Technical Ordnance as a private commercial enterprise. If the transaction were under Department of Defense contract from government to government, no State Department license would be required because the transaction would be exempt.

Heider advised that since 1988, Technical Ordnance has been awarded 24 contracts as a DOD prime contractor, valued at approximately $10,000,000.00. Heider advised that 1992, has been the year of least activity for Technical Ordnance as a DOD contractor.

On September 10, 1992, ATF Inspector Kim Kratochvil, St. Paul, Minnesota, advised that the bulk of records maintained by Technical Ordnance with respect to the activities associated with the government contracts are

computerized. Inspector Kratochvil further advised that Technical Ordnance is also currently operating the St. Bonifacius, Minnesota, facility. They are manufacturing Mark 96 detonators and are storing the explosive lead azide and barium chromate in some of the existing twenty 10,000 lb. limit magazines at this location. Technical Ordnance currently has been awarded five prime contracts and three sub-contracts by the DOD. The majority of contracts awarded are classified as fixed price contracts. DOD advised that currently Technical Ordnance does have a GFM (Government Furnished Materials) contract in which they received 5000 lbs, of CH6 Composition from Feranti Industries for the manufacture of ignition devices. Technical Ordnance currently has 395 lbs. of CH6 Composition in storage.

On September 28, 1992, Special Agent Randy Heider, DCIS, St. Paul, Minnesota, provided me with copies of a computer printout from the U.S. State Department, Office of Defense Trade Control, Washington, D.C., which lists shipments of explosives by Technical Ordnance to various foreign countries from January 19, 1983, thru June 3, 1992, totalling approximately $11,100,434.00 (Exhibit 8). These transactions are commercial sales approved by the U.S. State Department and issued a specific license number for exportation to the foreign country and not exempted foreign military sales.

On September 30, 1992, I contacted the ATF Licensing Section, Atlanta, Georgia, and learned that the Technical Ordnance facility at County Road 92 and Nike Road, St. Bonifacius, Minnesota, is licensed as an explosives manufacturer under ATF license number 3-MN-027-20-3D-00303 which expires in April, 1993.

On October 5, 1992, I received a shipping invoice from Trojan Corporation to Technical Ordnance, Clear Lake, South Dakota, regarding the shipment of explosives pursuant to specific government contracts dated May 9, 1989.

On October 13, 1992, I received photographs of the Technical Ordnance facility, county Road 92 and Nike Road, St. Bonifacius, Minnesota, and directions to that location from ATF Inspector Kim Kratochvil, St. Paul, Minnesota.

The affiant states and believes that violations of Title 18, USC, Section 1001, have occurred for the following reasons:

1) Technical Ordnance Inc., County Road 7, Clear Lake, South Dakota, is presently, and has been licensed by ATF as an explosives manufacturer since March 2, 1989.
2) As a Federally licensed explosives manufacturer, Technical Ordnance is required by law to maintain records of manufacture, acquisition and disposition of explosives.
3) Norman Hoffman, President of Technical Ordnance Inc. and John Yuhas, Vice President of Technical Ordnance Inc., on March 20, 1992, stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated that he was only involved in U. S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping.
4) Documents from the U. S. Customs Service and the U. S. State Department show commercial exports of explosives by Technical Ordnance Inc. from January 19, 1983 through June 3, 1992, totaling approximately $11,100,434.00.

In addition, violations of Chapter 40, Title 18, USC, Section 842(f) have occurred based on the following information:

5) Technical Ordnance Inc., County Road 7, Clear Lake, South Dakota, is presently, and has been licensed by ATF as an explosives manufacturer since March 2, 1989.

6) As a Federally licensed explosives manufacturer, Technical Ordnance is required by law to maintain records of manufacture, acquisition and disposition of explosives.

7) On April 17, 1990, during an ATF Compliance Inspection of Technical Ordnance Inc. Clear Lake, South Dakota, Norman Hoffman and John Yuhas stated that all activities at the Clear Lake facility were related to U. S. Department of Defense government contracts and therefore exempt from ATF regulation. That all of the records of explosive materials acquisitions are kept at the corporate headquarters in Waconia, Minnesota. Explosive materials are transferred from one Technical Ordnance facility to another.

8) On July 25, 1990, John Yuhas sent a letter to ATF stating that all of the activities at Technical Ordnance Inc., Clear Lake, South Dakota were conducted pursuant to U. S. government contracts.

9) Norman Hoffman, President of Technical Ordnance Inc. and John Yuhas, Vice President of Technical Ordnance Inc., on March 20, 1992 stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated he was only involved in U. S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping.

10) Documents from the U. S. Customs Service and the U. S. State Department show commercial exports of explosives by Technical Ordnance Inc. from January 19, 1983 through June 3, 1992, totaling approximately $11,100,434.00.

11) By making false statements and claiming an exemption for all activities relating to the manufacture and sale of explosive materials; either no records are being maintained for the commercial transactions, which are required by law and fall within the regulation and

jurisdiction of ATF, or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations.

Therefore your Affiant requests a warrant to search, inspect and seize any and all books, records, receipts, invoices, notes, contracts, ledgers and other papers relating to the transportation, ordering, purchasing, sale, transfer, export, and manufacture of explosive materials, explosive devices, explosive activated tools or devices and military explosive devices, detonators, fuses, electronic equipment such as computers, telex machines, facsimile machines and computer software, tapes and discs and contents therein, containing the information generated by the aforementioned electronic equipment and communication devices, any explosive materials or devices found to be manufactured, maintained, stored, purchased or offered for sale, in violation of Federal Law, which maybe located at the below–described property:

Technical Ordnance Inc., Clear Lake, South Dakota, which is an industrial complex located approximately one mile north of Clear Lake, South Dakota, on Highway 15, then approximately one mile east on County Road 7, located on the north side of County Road 7. The premises is surrounded by a chain link fence with access on to County Road 7, facing south. Within the confines of the complex are numerous structures and/or buildings, including but not limited to a corporate office building, production area, temporary storage buildings, drying houses and twenty explosive storage magazines. (Exhibit 9, Photograph of Premises.)

Dated this 19th day of October, 1992.

/s/
Douglas C. Moore
Special Agent, ATF

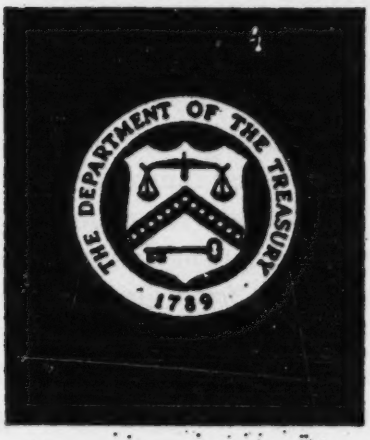
Subscribed to and sworn before me this 19th day of October, 1992.

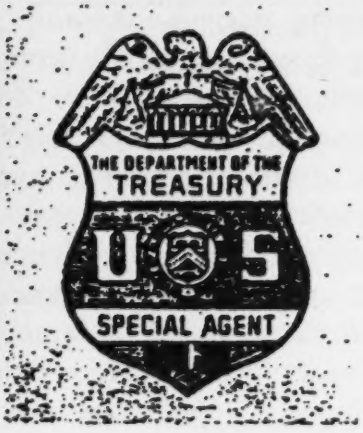
/s/
Frank P. Gibbs
U.S. Magistrate

DEPARTMENT OF THE TREASURY

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

OFFICE OF LAW ENFORCEMENT





CASE REPORT

Case No. 33460 92 3033 R
TECHNICAL ORDNANCE et. al

Judicial District South Dakota

Submitted By: J. Robert Switzer

SPECIAL AGENT IN CHARGE

Prepared by: Special Agent Douglas C. Moore
FTS: (605) 330-4368

THE DEPARTMENT OF THE TREASURY
Bureau of Alcohol, Tobacco and Firearms

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DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND
FIREARMS
ST. PAUL, MINNESOTA 55101-4901

CASE: 33460 92 3033 R

Report examined, approved
and
recommended for prosecution.

s/ J R Switz 2-28-93
Special Agent in Charge

Mr. Kevin V. Schieffer
United States Attorney
Judicial District of South Dakota
230 South Phillips Avenue
Sioux Falls, South Dakota 57102

* * *

[Excerpt from page 74]

United States vs. TECHNICAL ORDNANCE
et. al
33460 92 3033 R

CHRONOLOGY OF EVENTS CONT.

* * *

On March 20, 1992, ATF contacted TECHNICAL ORDNANCE, Clear Lake, South Dakota, for the purposes of conducting a follow-up Compliance inspection regarding the

storage violations TECHNICAL ORDNANCE, was cited on April 17, 1990, and to obtain information regarding recent accidental explosions occurring at the facility that were reported to ATF. Norman Hoffman and John Yuhas were present during the contact at which time both persons made false statements claiming that TECHNICAL ORDNANCE, was exclusively engaged in DOD contracts and participated in no activity relating to commercial transactions. Consequently, Hoffman and Yuhas asserted that ATF had no jurisdiction over TECHNICAL ORDNANCE, activities, that TECHNICAL ORDNANCE, was exempt under CFR Part 55.141. Hoffman and Yuhas falsely stated that TECHNICAL ORDNANCE, was not engaged in commercial transactions foreign or domestic. The compliance inspection was completed.

(Exhibits 4, Kratochvil; 7, Moore)

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

BEFORE THE GRAND JURY

* * * * * * * * * * * * * * *

United States of America,

Plaintiff,

-vs-

Technical Ordnance Inc.,
a Minnesota corporation; and
Norman Hoffman,

Defendants.

* * * * * * * * * * * * * * *

TESTIMONY OF

Doug Moore - Page 6
Randy Heider - Page 37
Jim Seltz - Page 46
Gloria Rutherford - Page 52

* * * * * * * * * * * * * * *

APPEARANCES: Ms. Karen E. Schreier
United States Attorney
Sioux Falls, South Dakota
-and
Ms. LeAnn Larson LaFave
Assistant United States Attorney

Sioux Falls, South Dakota
Attorneys for the United States of America.

PROCEEDINGS: The following proceedings were held on the 16th day of September, 1993 commencing at the approximate hour of 10:55 a.m. in the Federal Building, Sioux Falls, South Dakota.

* * *

[Excerpts from pages 28-29]

Q Okay. Now you have had a chance to visit the Clear Lake facilities on more than one occasion; is that correct?
A Yes.
Q And in the course of those visits, have you had personal contact and conversation with Norman Hoffman, the plant manager?
A Norman Hoffman is the owner.
Q I'm sorry.
A Yes, I have.
Q Thanks for the correction. Gloria Rutherford is the plant manager. We will see her later. And in the course of those conversations, has he made representations to you or to the regulators who accompanied you on the compliance visits which do not jibe with your understanding of the way the business was operated during the period in question from 1987, September, until the present time?
A Yes, he has.
Q Okay. Would you elaborate the nature of the representations he made to you which do not coincide with your findings based on the review of the records?
A Well, the first contact I had with Mr. Hoffman had to do with a follow-up investigation on my part concerning some accidental explosions where persons were injured at his

facility. And when we met with him, his first response was, I function entirely under the Department of Defense and therefore exempt. You have no jurisdiction here. I don't have any answers because I don't have to give you any answers.

My question to him at that point was, if you are a totally exempt facility, why do you have an ATF license. And his response was because they forced me to. And when asked specifically what is taking place at the Clear Lake plant, he related at that point in time, they were not engaged in any commercial activity, nor were they at a given point in time engaged in any contract with foreign sales.

Q So you have since found out not all of the business being conducted at the Clear Lake facility was exempt defense contract work; is that correct?

A That's correct.

Q And there is clear evidence based on the columns we previously discussed that explosives were being manufactured and shipped commercially, both domestically and foreign commerce and not pursuant to a Department of Defense contract, or U.S. government contract?

A That's correct.

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 93-10025
vs.	)	
TECHNICAL ORDNANCE, INC., a Minnesota corporation; and NORMAN H. HOFFMAN, Defendants.	)	

APPEARANCES: MR. ROBERT A. MANDEL
Assistant United States Attorney
District of South Dakota
317 Federal Building & US Courthouse
515 Ninth Street
Rapid City, South Dakota

On behalf of the United States of America

PROCEEDINGS: The following Proceedings were held in the Grand Jury Room in the Federal Building, 515 Ninth Street Rapid City, South Dakota, on the 18th day of January, 1994 at 11:35 a.m.

WHEELER COURT REPORTING

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* * *

[Excerpts from pages 7-8]

Q Why don't you just give us a very brief overview of the case again. Then I'm going to open this up to any questions from the grand jury and any parts they may want to go over again.

A This case has to do with an explosive manufacturer that owns two facilities; one outside the Twin Cities in Minnesota, and one in Clear Lake, South Dakota. From 1970 until 1989 this company acted illegally by operating without an explosives manufacturing license issued by ATF.

In 1989 March of that year, they were issued a license and began conducting activity as a licensed explosive manufacturer. From 1970 to 1989 since they were not licensed, the only way they could legally obtain explosive materials in interstate commerce to conduct their business was to use a government contract number, which basically certified that the work that they were conducting was exempted work on behalf of the United States Government pursuant to Department of Defense contract.

This company basically has two parallel operations. One is a commercial venture which is subject to the laws and provisions of explosives agents and is under the regulation of ATF, and that side of the work which they performed on the United States Government pursuant to Department of Defense contracts.

This company has maintained all along they are not engaged in any commercial activity and that's basically the nature of this case.

Q Just reduce it to kind of a simplistic level in terms of the stuff they were doing for the Department of Defense, that is in fact exempt?

A Correct.

Q And kind of the crux of this case is simply they were doing other stuff not for the Department of Defense but were claiming it fell under that exemption?

A That's correct.

Q My understanding is the grand jury has had significant testimony on this case previously. I don't intend to go through all that again unless people need to hear it to have their recollection refreshed on the case. At this time I will ask the members of the grand jury if they have any inquiries then to make of Mr. Moore and we'll go from there.

(No questions were presented.)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

* * * * * * * * * * * * * * *

UNITED STATES OF AMERICA,	CR 93-10025
Plaintiff,	February 9, 1994
-vs-	1:15 p.m.
TECHNICAL ORDNANCE, INC., a Minnesota Corporation,	
Defendant, and	Aberdeen, South Dakota
NORMAN HOFFMAN,	(Pages 96 - 240)
Defendant.	

* * * * * * * * * * * * * * *

VOLUME II

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE LAWRENCE L. PIERSOL, UNITED STATES DISTRICT JUDGE, and a Jury.

APPEARANCES:

For Plaintiff: MS. LeANN LARSON LaFAVE
Assistant United States Attorney
P. O. Box 5073

Sioux Falls, South Dakota 57117

-and-

MR. WILLIAM J. FOX
Office of Assistant Chief - ATF
300 S. Riverside Place #330
Chicago, Illinois 60606

For Defendant Technical Ordnance: MR. BRUCE H. HANLEY
Attorney at Law
Suite 700
701 Fourth Avenue South
Minneapolis, Minnesota 55415

For Defendant Norman Hoffman: MR. WILLIAM J. MAUZY
Attorney at Law
2885 Norwest Center
Minneapolis, Minnesota 55402

Court Reporter: Richard A. Christoffer
455 Federal Building
225 S. Pierre Street
Pierre, South Dakota 57501

* * * *

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* * *

[Excerpts from pages 105, 111-112, 114-119, 127]

Q Yes. You knew in March of 1992 that Technical Ordnance had told Alcohol, Tobacco and Firearms before March of 1992 that they were engaged in foreign military sales?

A Yes.

Q You knew that?

A Yes.

Q This isn't something that you discovered on your own as a result of the investigation, true?

A No, I knew that ahead of time.

Q Yeah. Alcohol, Tobacco and Firearms, that agency, that bureau, knew that Technical Ordnance had informed them that they were doing foreign military exports, right?

A Yes.

Q And you knew from contacting people in the Department of Defense that the Department of Defense knew because Technical Ordnance had told them that, in fact, Technical ordinance did foreign military exports?

A They communicated to me that, yes, they were aware of that fact.

* * *

Q He, Mr. Yuhas, obtained the list of all the jobs that were being worked on in Clear Lake, South Dakota, on March 20th of '92, right?

A That's what he represented to us, yes.

Q And he said to you that at that time in Clear Lake, South Dakota, all of the jobs were Department of Defense contracts?

A Yes.

* * *

Q Did you ask for -- they showed you a list of jobs, did they not?

A That's correct.

Q And they said these are the jobs that we're doing right now in Clear Lake, South Dakota, isn't that right?

A Yes.

Q And they told you that they're all Department of Defense contract jobs, right?

A That's correct.

Q And you could have gone to St. Bonifacious and said I want to see those? I want to see the jobs that you listed on that list that you showed me on March 20th of '92, right?

A The request could have been made, yes.

Q And you did not do that?

A That's correct.

Q When Agent Kratochvil asked Mr. Hoffman -- first of all, you have a discussion with Yuhas, you look at this list, Yuhas tells you on this list it's all Department of Defense contract work, Mr. Hoffman agrees with that, right?

A Yes.

Q And Agent Kratochvil says, now, tell me, Technical Ordnance, what kind of business, or words to that effect, what kind of business does Technical Ordnance do, and Mr. Hoffman responded, we do U.S. Government contracts and foreign military sales, isn't that right?

A The sequence of the events isn't correct.

Inspector Kratochvil engaged in conversation with respect to what activities were being conducted at Clear Lake prior to the presentation of this document that represented government contract numbers.

Q When Mr. Hoffman was asked the question by Inspector Kratochvil about the business that Technical Ordnance engages in, he told Inspector Kratochvil that the business Technical Ordnance engaged in was government contracts and foreign military sales, isn't that right?

A No. He said that he exclusively did nothing but Department of Defense contracts. That they were no longer doing foreign military sales nor were they no longer producing destructive devices.

Q Agent Moore, you were present on March 20th of '92, right?

A Yes.

Q And you heard Inspector Kratochvil asking the question of Mr. Hoffman, does Technical Ordnance engage in commercial activity, words to that effect, isn't that right?

A Yes.

Q You heard that?

A Yes.

Q And in response Mr. Hoffman said Technical Ordnance engages in Department of Defense contracts and foreign military sales?

A No. His words were, we do exclusively Department of Defense contracts. That was his reason for saying to me that I had no jurisdiction for being there.

Q And it's your testimony, Agent Moore, that you never heard Mr. Hoffman say the words "foreign military sales" on March 20th of '92?

A No. I recall him talking with John Yuhas and making a reference to that context in the past, but not present.

Q Did you hear Inspector Kratochvil ask the question of Mr. Hoffman if he was engaged in commercial activity?

A Yes.

Q Did you hear Mr. Hoffman respond that they were doing Department of Defense contracts and foreign military sales?

A No.

Q Now, you testified last week at a hearing, didn't you?

A Yes.

Q You were under oath like you are now?

A Yes.

Q Sworn to tell the truth? Sworn to tell the truth, right?

A Yes.

Q And you did, right?
A Yes.
Q I'm going to show you a transcript of that proceeding, and that was before Judge Piersol last week, right?
A Yes.
Q We are not talking about ancient history, right? Last week?
A Right.
Q Okay. I'm referring to page 8. You were under oath when you were asked this question, right?
A Yes.
Q This relates to March 20th of '92.
A Okay.
Q All right. Were you asked the question by me, "Do you recall Inspector Kratochvil asking the question of Mr. Hoffman, does Technical Ordnance engage in commercial activity?" Do you remember that question?
A Yes.
Q Did you answer, "Yes"?
A Yes, I did.
Q Did I then ask you the question, "Do you recall Mr. Hoffman responding that Technical Ordnance engages in Department of Defense contracts and foreign military sales?"
Do you remember your answer to my question, sir?
A "Yes."
Q And you answered my question "yes", did you not?
A Yes.
Q So, in fact, you did hear Mr. Hoffman respond to Inspector Kratochvil's question, and he said Technical Ordnance engages in Department of Defense contracts and foreign military sales, isn't that right?
A Well, to qualify that. Again, with respect to what had been conducted prior --
Q No, I'm asking you about a specific conversation, sir, a specific question that you've acknowledged that you heard, and a specific answer to that question.

Did you hear the answer to that question by Mr. Hoffman?

A Yes.

Q And you acknowledge now, do you not, that Mr. Hoffman responded to Agent Kratochvil's question about commercial activity by saying they engage in Department of Defense contracts and foreign military sales, right?

A Again, qualifying that the company had conducted foreign military sales in the past.

Q I'm asking about a specific conversation, do you --

MR. MAUZY: May I approach again, Your Honor?

BY MR. MAUZY:

Q Page 8, let me read this out loud to you, all right? Is this page 8? Follow with me and see if I'm misleading you here.

"Do you recall Inspector Kratochvil asking the question of Mr. Hoffman, does Technical Ordnance engage in commercial activity?" Did I read that right, sir?

A That's correct.

Q And your answer to that question was "yes"?

A Yes.

Q I followed up with the next question on page 8.

"Do you recall Mr. Hoffman responding that Technical Ordnance engages in Department of Defense contracts and foreign military sales?"

Q And was your answer, sir, under oath last week?

A "Yes."

* * *

Q But you knew before March 20th of '92 that Mr. Hoffman used the term "foreign military sales" to include sales from him going directly to foreign military governments, right?

A Yes.

* * *

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

February 18, 1994
William F Clayton
Clerk

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

TECHNICAL ORDNANCE, INC., a Minnesota corporation; and NORMAN HOFFMAN,

Defendant.

CR 93-10025

VERDICT

STATE OF SOUTH DAKOTA, DISTRICT OF SOUTH DAKOTA } ss
I, JOSEPH HAAS, Clerk of the United States District Court for the District of South Dakota, hereby certify that the above and foregoing is a true copy of the original now on file in my office.
Dated 2/25/94
JOSEPH HAAS, Clerk
By Deputy

Please return a verdict by placing an "X" or "√" in the space provided.

UNLAWFUL MANUFACTURE, DISTRIBUTION, DEALING AND STORAGEOF EXPLOSIVE MATERIALS
(18 U.S.C. §§ 842(a)(1), 844(a))

COUNT I

We, the jury in the above entitled action, as to the crime of manufacturing, and/or dealing in explosive materials without a license as charged in Count I of the Indictment, find the defendant, Norman Hoffman:

Count I __X__ NOT GUILTY _____GUILTY

UNLAWFUL DISTRIBUTION OF EXPLOSIVE MATERIALS
(18 U.S.C. §§ 842(b), 844(a))

COUNT II - V

We, the jury in the above entitled action, as to the crime of unlawful distribution of explosive materials as charged in Counts II - V of the Indictment, find the defendant, Norman Hoffman:

Count II __X__ NOT GUILTY _____GUILTY
Count III __X__ NOT GUILTY _____GUILTY
Count IV __X__ NOT GUILTY _____GUILTY
Count V __X__ NOT GUILTY _____GUILTY

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Verdict pg.

UNLAWFUL MANUFACTURING, PURCHASING, DISTRIBUTING, AND RECEIVING OF EXPLOSIVE MATERIALS WITHOUT MAINTAINING PROPER RECORDS
(18 U.S.C. §§ 842(f), 844(a))

COUNTS VI - XVI

We, the jury in the above entitled action, as to the crime of manufacturing, purchasing, distributing, and receiving of explosive materials without maintaining proper records as charged in Counts VI - XVI of the Indictment, find the defendant, Norman Hoffman:

Count VI	X	NOT GUILTY	_____	GUILTY
Count VII	X	NOT GUILTY	_____	GUILTY
Count VIII	X	NOT GUILTY	_____	GUILTY
Count IX	X	NOT GUILTY	_____	GUILTY
Count X	X	NOT GUILTY	_____	GUILTY
Count XI	X	NOT GUILTY	_____	GUILTY
Count XII	X	NOT GUILTY	_____	GUILTY
Count XIII	X	NOT GUILTY	_____	GUILTY
Count XIV	X	NOT GUILTY	_____	GUILTY
Count XV	X	NOT GUILTY	_____	GUILTY
Count XVI	X	NOT GUILTY	_____	GUILTY

FALSE STATEMENTS
(18 U.S.C. § 1001)

COUNTS XVII - XIX

We, the jury in the above entitled action, as to the crime of making false statements as charged in Counts XVII - XIX of the Indictment, find the defendant, Norman Hoffman:

Count XVII	X	NOT GUILTY	_____	GUILTY
Count XVIII	X	NOT GUILTY	_____	GUILTY
Count XIX	X	NOT GUILTY	_____	GUILTY

CONSPIRACY
(18 U.S.C. § 371)

COUNT XX

We, the jury in the above entitled action, as to the crime of conspiracy as charged in Count XX of the Indictment, find the defendant, Norman Hoffman:

Count XX	X	NOT GUILTY	_____	GUILTY

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Verdict page 3

UNLAWFUL MANUFACTURE, DISTRIBUTION, DEALING AND STORAGE OF EXPLOSIVE MATERIALS
(18 U.S.C. §§ 842(a)(1), 844(a))

COUNT I

We, the jury in the above entitled action, as to the crime of manufacturing, and/or dealing in explosive materials without a license as charged in Count I of the Indictment, find the defendant, Technical Ordnance, Inc.:

Count I ___X___ NOT GUILTY _____ GUILTY

UNLAWFUL DISTRIBUTION OF EXPLOSIVE MATERIALS
(18 U.S.C. §§ 842(b), 844(a))

COUNT II - V

We, the jury in the above entitled action, as to the crime of unlawful distribution of explosive materials as charged in Counts II - V of the Indictment, find the defendant, Technical Ordnance, Inc.:

Count II ___X___ NOT GUILTY _____ GUILTY
Count III ___X___ NOT GUILTY _____ GUILTY
Count IV ___X___ NOT GUILTY _____ GUILTY
Count V ___X___ NOT GUILTY _____ GUILTY

UNLAWFUL MANUFACTURING, PURCHASING, DISTRIBUTING, AND RECEIVING OF EXPLOSIVE MATERIALS WITHOUT MAINTAINING PROPER RECORDS
(18 U.S.C. §§ 842(f), 844(a))

COUNTS VI - XVI

We, the jury in the above entitled action, as to the crime of manufacturing, purchasing, distributing, and receiving of explosive materials without maintaining proper records as charged in Counts VI - XVI of the Indictment, find the defendant, Technical Ordnance, Inc.:

Count VI ___X___ NOT GUILTY _____ GUILTY
Count VII ___X___ NOT GUILTY _____ GUILTY
Count VIII ___X___ NOT GUILTY _____ GUILTY
Count IX ___X___ NOT GUILTY _____ GUILTY
Count X ___X___ NOT GUILTY _____ GUILTY
Count XI ___X___ NOT GUILTY _____ GUILTY

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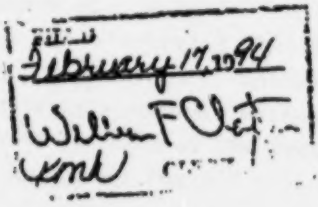
Count XII	X	NOT GUILTY	_____	GUILTY
Count XIII	X	NOT GUILTY	_____	GUILTY
Count XIV	X	NOT GUILTY	_____	GUILTY
Count XV	X	NOT GUILTY	_____	GUILTY
Count XVI	X	NOT GUILTY	_____	GUILTY

Dated this 18 day of ~~January~~ February, 1994.

Ted Kamlar
Foreperson

We would like to adjourn for the evening. We have covered all 20 counts but some Jurors would like to think over nite about some of the Charges.

Also is it possible to make a statement in writing or verbally after the Verdict is read, the Jurors feel a statement of the public should be made.



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UNITED STATES OF AMERICA }
DISTRICT OF SOUTH DAKOTA } ss

I, JOSEPH HAAS, Clerk of the United States District Court for the District of South Dakota, hereby certify that the above and foregoing is a true copy of the original now on file in my office.

Dated 2/25/94

JOSEPH HAAS, Clerk

By _____ Deputy

0625

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

TECHNICAL ORDNANCE, INC., a Minnesota corporation, and NORMAN H. HOFFMAN, individually,

Plaintiffs,

v.

DOUGLAS MOORE, a special agent of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; JOHN DOE I through JOHN DOE V, UNKNOWN NAMED AGENTS OF THE ATF, and/or other officials of the United States Government, or other person or persons unknown to plaintiffs at the time of filing this Complaint, whose conduct has individually, or in concert with others, deprived plaintiffs of their Constitutional rights; and the UNITED STATES OF AMERICA,

Defendants.

Civil No. 95-1039

DECLARATION OF NORMAN H. HOFFMAN

Norman H. Hoffman declares under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am a citizen of the United States of America and reside in Waconia, Minnesota. I make this declaration in support of Plaintiffs' Memorandum of Law in Opposition to

Defendant Moore's Motion for Summary Judgment. All facts stated herein are based upon my personal knowledge.

2. I am President of Technical Ordnance, Inc. ("Technical Ordnance"). Technical Ordnance is a Minnesota corporation with a principal place of business located at 9200 Nike Road, St. Bonifacius, Minnesota, and a manufacturing facility located in Clear Lake, South Dakota. It has been in business since 1964. Technical Ordnance manufactures propellant actuated devices ("PADS") and other products.

3. Since at least the 1980's, Technical Ordnance's business has consisted of manufacturing and selling PADs for military applications in connection with (i) Department of Defense ("DoD") contracts; and (ii) foreign military sales. By foreign military sales, I mean sales to foreign countries, both directly and through export brokers licensed by the U.S. Department of State. In every instance of a foreign military sale, Technical Ordnance obtained an export license, approving each sale, from the U.S. Department of State. Technical Ordnance does not engage in commercial sales to the general public, as opposed to sales under contract with the United States government or to a foreign country.

4. Throughout the course of its business, and long before 1992, Technical Ordnance informed various government agencies, including the Bureau of Alcohol, Tobacco and Firearms of the United States Department of the Treasury ("the ATF"), that it was involved in DoD contracts and foreign military sales. Further, in the ordinary course of business, and long before 1992, I and other Technical Ordnance personnel have made clear to ATF officials what I and Technical Ordnance mean by the terms foreign military sales and commercial sales, including our view that -- despite ATF's assertion to the contrary -- sales to foreign governments or foreign companies under contract with foreign governments do not constitute commercial sales and are beyond the proper scope of ATF jurisdiction.

5. For example, in June 1988 I and John Yuhas, Technical Ordnance's late Vice President, specifically told the ATF that Technical Ordnance shipped product to foreign governments or foreign companies under contract with foreign governments, both directly and through export brokers. I had other discussions on this subject with the ATF as well, including discussions in February 1989. Technical Ordnance was given the green light to proceed with such transactions, and the ATF informed the company that all foreign military sales involving PADS (as opposed to explosives such as destructive devices) did not require an ATF license. (See correspondence of Sarah Armstrong to the ATF dated February 14, 1989, reproduced at Moore Dec. Ex. B.) Nonetheless, Moore pursued criminal charges against me and the company for engaging in these very same transactions.

6. In 1989, the ATF took the position that certain foreign military sales fell within the ATF's jurisdiction and therefore necessitated that Technical Ordnance obtain an ATF license. Before 1989, even though it had been apprised of the nature of Technical Ordnance's business, ATF did not require Technical Ordnance to obtain an ATF license.

7. I disagreed with the ATF's position, because in my view foreign military sales are not commercial sales within the regulatory jurisdiction of ATF. Notwithstanding that I disagreed with ATF's position, I caused Technical Ordnance to obtain the license upon which ATF insisted. On or about March 3, 1989, Technical Ordnance obtained an ATF license for both its St. Bonifacius, Minnesota and Clear Lake, South Dakota facilities, and has retained those licenses ever since.

8. ATF conducted an inspection of Technical Ordnance's Clear Lake facility in April 1990, and an inspection of Technical Ordnance's St. Bonifacius facility in August 1990. I am informed and believe that the ATF inspector concluded that Technical Ordnance's record keeping was in compliance with ATF regulatory requirements. I was never advised by ATF or anyone else,

prior to the unfounded indictment against me and Technical Ordnance, that ATF considered Technical Ordnance's records out of compliance.

9. During March 1992, Moore and ATF agent Kim Kratochvil inspected Technical Ordnance's facility at Clear Lake, South Dakota. During the inspection, Moore took offense to certain requirements that Technical Ordnance sought to impose upon him, including without limitation: (i) requiring Moore to sign Technical Ordnance's visitors' register; (ii) requiring Moore to wear a security badge; and (iii) requiring Moore to wear proper non-static, safety footwear, before venturing into Technical Ordnance's facilities. These measures are required by rules and regulations promulgated by the DoD which I, Technical Ordnance, and all visitors to the company's premises are legally required to follow.

10. During this inspection, Moore refused to sign Technical Ordnance's register, refused to wear any security badge, and refused to wear the proper non-static, safety footwear in the explosives bunkers.

11. Moore made such comments to personnel of Technical Ordnance as: (i) "Do you realize that I wear a badge?"; (ii) "Do you know that I carry a gun?"; and (iii) "Do you understand that I can arrest people?"

12. Moore, in both his declaration and search warrant affidavit, falsely and misleadingly describes the communications between myself, the late John Yuhas, Moore, and Kratochvil at the March 20, 1992 inspection. Contrary to Moore's declaration and search warrant affidavit, I did not state that "the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments." (Search Warrant Affidavit ("SWA"), Moore Dec. Ex. B, at 7.) I did not state that I was "only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping." (SWA at 7.) I did not state that "because [my] operation currently involves only

Department of Defense contracts, that ATF has no jurisdiction and [my] companies [sic] activities are exempted under Title 27, CFR, Section 55.141." (SWA at 2-3.)

13. In point of fact, at the March 20, 1992 inspection I reiterated, in response to a question by defendant Moore and Kratochvil about Technical Ordnance's business, what he and others at the ATF and other Government agencies already knew – that Technical Ordnance manufactured PADs for the U.S. Government and foreign military sales. Contrary to Moore's current statements (Def. Brief at 7; Moore Dec. ¶ 9), neither I nor Mr. Yuhas ever said that the company had discontinued selling PADs to foreign countries. I also reiterated the position that I and Technical Ordnance have taken for years and about which Moore and ATF were well aware: that Technical Ordnance's foreign military sales are not commercial sales within the jurisdiction of the ATF. Rather, foreign military sales are in fact under the export jurisdiction of the State Department. Moreover, as indicated in the letter dated February 14, 1989 to the ATF, the ATF agreed with Technical Ordnance that it did not need an ATF license for PADs sold in foreign military sales. (See item nos. 3 and 4 of said letter; compare item no. 5 involving foreign military sales involving explosives such as destructive devices.)

14. At the March 20, 1992 inspection, in addition to inquiring about Technical Ordnance's business in general, Moore and Kratochvil asked what Technical Ordnance was currently working on at the Clear Lake facility. I initially responded that I did not know. In order to answer that question, John Yuhas then obtained a computer printout showing the jobs that were being worked on at Clear Lake on that particular day. After reviewing the list, Mr. Yuhas stated that that they were all U.S. government contracts. I reviewed the list, too, and I agreed with Mr. Yuhas's statement, which was absolutely true. At no time did I ever state that the company itself, including all facilities, "currently involves only Department of Defense

contracts...." (SWA at 2-3.) Both Moore and Kratochvil were given the opportunity to review the computer printout. Neither of them questioned its accuracy. Indeed, to this day no one has questioned the accuracy of that list or the statement Mr. Yuhas made (and in which I concurred) in reliance upon it. The statement was a truthful and accurate response to the question posed by Moore and Kratochvil.

15. During the March 20, 1992 inspection, I also informed the ATF agents that records of all DoD contracts and foreign military sales were kept at the company's St. Bonifacius facility. Following the inspection at Clear Lake, the ATF agents failed to follow up and go to the St. Bonifacius facility to review any records.

16. At page 5 of his Brief in Support of Summary Judgment, Moore refers to his quote of me (SWA at 3) as stating that the company "has discontinued manufacturing destructive devices...." Even though Moore has formerly testified and argued (falsely) that I never disclosed that Technical Ordnance was engaged in foreign military sales, Moore now shifts his position and argues that this statement indicates that he did accurately quote me as stating that the company had "in the past sold products to...foreign customers and governments" (Def. Brief at 5, 7; emphasis added). Contrary to Moore's statements, I have never stated that the company's involvement in foreign military sales was limited to "the past." Although we had no foreign military sale contracts on site at the Clear Lake facility on March 20, 1992, Mr. Yuhas and I told Moore that the company did in fact work on foreign military sales. Moreover, in order to shift gears, Moore quotes out of context a discussion with me regarding destructive devices. (Moore Dec. ¶ 4.) Moore states that "Hoffman stated that his company...is not currently providing explosive materials to foreign customers or governments." (Id.; omission original.) In fact, the company had ceased to work with "destructive devices," the phrase deleted from Moore's above "quotation." Using this discussion regarding destructive devices to put words in my

mouth about PADs therefore constitutes yet another deliberate misrepresentation. Pursuant to the ATF's own advice and direction, the company used PADs, not destructive devices, for foreign military sales. Any conversation regarding destructive devices simply does not relate to this issue.

17. During the March 20, 1992 inspection, I expressed my concern over the ATF's harassing refusal to comply with DoD mandated safety regulations while on the premises of Technical Ordnance. I also expressed to the ATF agents my deeply held philosophy that private enterprises are unduly burdened with excessive and duplicative regulatory oversight by multiple government agencies with conflicting regulations and overlapping jurisdictions.

18. It is inconceivable to me that Moore could infer from the communications at the March 20, 1992 inspection that I or Technical Ordnance were attempting to avoid our legal obligations in any way. Despite my deeply held views about what I considered an absolutely improper expansion of ATF jurisdiction over Technical Ordnance's business, Technical Ordnance obtained in 1989 -- three years before the events of 1992 -- the licenses that ATF contended were required. Technical Ordnance was complying with those record keeping requirements on March 20, 1992. Further, all of the statements I made on that day were entirely consistent with the information about Technical Ordnance that the ATF already possessed as well as the information described by Moore as having been obtained from the Department of Defense and the U.S. Customs office.

19. Moore's assertion that I and Technical Ordnance were somehow trying to hide the fact that Technical Ordnance's business included foreign military sales is ludicrous as well as fraudulent. The DoD and the State Department keep detailed records of all of Technical Ordnance's sales to U.S. and foreign governments, and the ATF has ready access to those records. Particularly since we ourselves had notified the ATF of the company's foreign

military sales, it would be absurd to conclude that I or anyone at Technical Ordnance believed we could somehow keep Technical Ordnance's foreign military sales a secret from the ATF. Technical Ordnance prior to, as well as on March 20, 1992, repeatedly, specifically, and accurately described its business activities, including its foreign military sales, to the ATF and Moore. Neither I nor Technical Ordnance was hiding anything related to Technical Ordnance's business, and Moore knew it.

20. Moore's search warrant affidavit contains numerous other false and misleading assertions. First, Moore asserts, "Technical Ordnance Inc. [addresses omitted] is presently, and has been licensed by ATF as an explosives manufacturer since March 2, 1989." This statement omits the facts that prior to the acquisition of an ATF license in 1989, Technical Ordnance apprised the ATF of the nature of its business through various communications with the ATF and the ATF did not require Technical Ordnance to acquire any ATF license. In addition, all Technical Ordnance products are manufactured under the supervisory authority of the DoD and the U.S. Department of State and, in my view, are therefore exempt from ATF jurisdiction.

21. Second, Moore asserts, "[a]s a Federally licensed explosives manufacturer, Technical Ordnance is required by law to maintain records of manufacture, acquisition and disposition of explosives." This statement also omits that Technical Ordnance did in fact maintain records of manufacture, acquisition and disposition of explosives, and that ATF had previously inspected our records and did not complain of any alleged noncompliance.

22. Third, Moore asserts, "Norman Hoffman, President of Technical Ordnance Inc. and John Yuhas, Vice President of Technical Ordnance Inc., on March 20, 1992, stated that the company was not engaged in any commercial sales or transactions of explosives, specifically sales to foreign customers or governments. Hoffman stated that he was only involved in U.S. Department of Defense government

contracts and therefore exempt from ATF jurisdiction and record keeping." This statement is demonstrably false by reason that I and John Yuhas, Vice President of Technical Ordnance, in fact stated that the company worked on DoD contracts and foreign military sales. Upon cross-examination at trial defendant Moore admitted that Technical Ordnance personnel in fact told him that the company worked on DoD contracts and foreign military sales.

23. Fourth, Moore asserts, "[d]ocuments from the U.S. Customs Service and the U.S. State Department show commercial exports of explosives by Technical Ordnance Inc. from January 19, 1983 through June 3, 1992, totaling approximately $11,100,434.00." This statement omits facts that all of Technical Ordnance's exports were made pursuant to proper export licenses issued by the U.S. Department of State. Based on Moore's description of them (the actual documents are not attached to his affidavit, despite Moore's designation of them as "exhibits"), the export documents from the U. S. Customs Service and the U. S. Department of State simply evidence the foreign military sales about which the ATF already knew and which were never concealed by Technical Ordnance. Moreover, records of all said foreign sales were available to the ATF at the St. Bonifacius facility, and in fact had been reviewed by ATF agents in the past.

Further, the fact of such exports is entirely consistent with statements made by me and other Technical Ordnance personnel on March 20, 1992 and at all other times. I and others at Technical Ordnance had told defendant Moore and others at the ATF that part of our business involved foreign military sales. The fact that we made exports is thus not at all surprising, nor is it in any way inconsistent with the fact that on March 20, 1992 Technical Ordnance's Clear Lake facility was only working on DoD contracts.

24. Fifth, Moore asserts, "[o]n July 25, 1990, John Yuhas sent a letter to the ATF stating that all of the activities at Technical Ordnance Inc., Clear Lake, South Dakota were conducted pursuant to U.S. government contracts." This

statement is demonstrably false by reason that John Yuhas' letter merely stated that "at this time" all contracts were related to DoD contracts. Indeed, the letter goes on to say that Technical Ordnance would modify the storage bunkers for foreign military sales in accord with the ATF's described requirements.

25. During or about October 1992, approximately twenty-four (24) agents of the ATF and other federal law enforcement agencies raided the St. Bonifacius and Clear Lake facilities of plaintiff Technical Ordnance. I was present at the St. Bonifacius facility. Throughout the course of the raid, Moore and other Government agents asked numerous questions about company records. We cooperated in every respect that we could to help Moore and others read the company's records, as well as fully understand the manner in which they were organized and interrelated. At times, Moore and others refused to look at certain categories of records required to understand the nature of the transactions at issue. If the ATF had bothered to look at such records it would have realized that many of its later charges were unfounded. In particular, Moore admitted at trial that he believe he was offered the opportunity to look at the purchase order file but refused. (Winn Aff., Ex. D at 1141.)

26. On February 18, 1994, in the United States District Court for the District of South Dakota, a jury acquitted me and Technical Ordnance of each and every one of 36 counts of the indictment unlawfully procured by defendants.

27. Before rendering its verdict, the jury submitted a written statement to the Court requesting the opportunity to make a statement to the public.

28. After the jury's discharge, the foreperson advised the local media that the government had introduced no evidence whatsoever of any criminal conduct. The jury could not understand why the ATF had not simply allowed employees of plaintiff Technical Ordnance to help the ATF understand company records and procedures.

29. On November 30, 1995, Technical Ordnance received a threatening telephone call from an angry, middle-aged man who, in an aggressive, threatening, and angry tone of voice, shouted out to plaintiff Technical Ordnance "be real careful of what you ship" and immediately hung up.

30. I understand said threatening telephone call was made shortly after Moore received service of process of the initial Complaint in this civil action.

31. I believe that Moore placed the threatening telephone call to Technical Ordnance on November 30, 1995 in continuation of his policy of implementing a retaliatory campaign of intimidation, harassment, and injury against me and Technical Ordnance.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 5, 1998

s/_____
Norman H. Hoffman

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

TECHNICAL ORDNANCE, INC., a Minnesota corporation, and NORMAN H. HOFFMAN, individually,

Plaintiffs,

vs.

DOUGLAS MOORE, a special agent of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), U.S. Department of the Treasury; JOHN DOE I through JOHN DOE V, UNKNOWN NAMED AGENTS OF THE ATF, and/or other officials of the United States Government, or other person or persons unknown to plaintiffs at the time of filing this Complaint, whose conduct has individually, or in concert with others, deprived plaintiffs of their Constitutional rights; and the UNITED STATES OF AMERICA,

Defendants.

Civil No. 95-1039

AFFIDAVIT OF JAMES SELTZ

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

James Seltz, having been duly sworn, states as follows:

1. I am a citizen of the United States of America and reside in Waconia, Minnesota. I make this affidavit in support of plaintiffs' opposition to defendants' motions for summary judgment. All facts stated herein are based upon my personal knowledge and my recent, in-depth review of the business records of Technical Ordnance, Inc.

2. I am currently the Contracts Administrator for Technical Ordnance, Inc. ("Technical Ordnance"). My responsibilities with Technical Ordnance have, since at least 1989, included production control work for foreign military sales or applying to the U.S. State Department for export licenses regarding such sales.

3. I have reviewed the document attached hereto as Exhibit A, entitled "ADHOC Query Report: Office of Defense Trade Controls." I understand that copies of this document were attached as exhibits to the search warrant affidavits prepared by ATF Special Agent Douglas Moore on or about October 19, 1992 for the company's Clear Lake and St. Bonifacius facilities. Based upon my review of this document, it is a report listing export licenses issued to Technical Ordnance during the time period 1983-1992.

4. At page 4 of the report, export licenses issued to Technical Ordnance during 1992 (and ending with August 26, 1992, the date of the report) are listed. No export licenses were issued during the time period between March 4, 1992 and June 8, 1992. The license that issued on March 4, 1992 relates to Technical Ordnance job #3896, a shipment of $225 worth of impulse cartridges to the United Kingdom. The production of these impulse cartridges had been completed at the company's Clear Lake facility on or before February 19, 1992, when they were tested at the St. Bonifacius facility. These cartridges were shipped from St. Bonifacius after March 4, 1992 upon issuance of the export license.

5. I have reviewed all other job files related to the company's foreign military sales from February through June of 1992. These documents definitively show that, as of

March 20, 1992, the company was not engaged in any foreign military sales activity at the Clear Lake facility.

6. Page 3 of the report includes listings of the export licenses issued to Technical Ordnance during 1990. No export licenses were issued between March 1, 1990 and August 15, 1990. Technical Ordnance was issued an export license on March 1, 1990 for $220,300 worth of impulse cartridges shipped to Israel. This was Technical Ordnance job #3659. Production of these cartridges did not commence until August 27, 1990 in Clear Lake.

7. I have reviewed all other job files related to the company's foreign military sales from January through August of 1990. These documents definitively show that, as of April 17, 1990, the company was not engaged in any foreign military sales activity at the Clear Lake facility.

8. Technical Ordnance has always maintained records of its foreign military sales at its St. Bonifacius or Waconia, Minnesota headquarters. All of the records that I have reviewed in preparing this Affidavit were available for review at Waconia or St. Bonifacius on April 17, 1990 and March 20, 1992, and at the St. Bonifacius facility on October 21, 1992, the date of the raid. To my knowledge, Technical Ordnance has never denied an ATF request for access to Technical Ordnance's records. Had Special Agent Moore requested access to these records as part of any kind of inspection, administrative or otherwise, Technical Ordnance would have complied. Had the ATF made such a review of Technical Ordnance's records, it would have discovered for itself the facts set forth herein regarding Technical Ordnance's foreign military sales.

/s/
James Seltz

Subscribed and sworn to before me
this 21st day of September, 1999.

s/ Diane L. Popelka
Notary Public

REPORT OF INTERVIEW WITH
Norman Hoffman, President
John Yuhas, Vice President
Steve Harmon, Project Engineer
Technical Ordnance, Inc.
at 654 Industrial Blvd., Waconia, MN 55387
on February 10, 1989
by Special Inspector Donald L. Willer
and Area Supervisor John Kodadek

Mr. Hoffman explained the nature of Technical Ordnance's business which he characterized as being primarily the design and manufacture of devices using precise quantities of custom compounded explosives to perform a single use function and where weight or size of the device is a factor. He used parachute line cutters and explosive bolts as examples of these devices. The compounding of the explosive mixtures would include the mixing of fuels and oxidizers. In some cases, finished explosives are purchased and used without further alteration. At least one propellant actuated tool made by Technical Ordnance incorporated a blasting cap as the propellant.

Other items mentioned as having been manufactured by Technical Ordnance are training grenades, fusing devices for bombs or shells, bomb ejectors for aircraft, chaff and flare ejectors for aircraft and ingredients for small arms ammunition.

Most of Technical Ordnance's work is done for the United States government either as a prime contractor or as a subcontractor to another industry member. They also contract directly with some foreign governments and ship to them under State Department permits. At present they have two shipments ready to go to Canada and to Israel.

Technical Ordnance obtains the explosives materials and ingredients it needs either from the U. S. government or from commercial sources both in and out of state. Some explosives needed for defense department work are manufactured only by or for the government and no ether source is available for them. Some contracts have required the use of smokeless powder which was purchased from local sporting goods stores. In some cases, Technical Ordnance has purchased from out of state suppliers such as Trojan Powder and Dupont. Technical Ordnance had no permits or licenses from ATF to allow interstate acquisition and transportation of explosives. The suppliers sold to them based on the supplier's knowledge that Technical Ordnance was a defense contractor. Mr. Yuhas believed that in most if not all of these purchases Technical Ordnance furnished the supplier with documentation of the government contract, including the contract number, to support the purchase. Some explosives purchased for use on government contracts were likely used in the production of items for sale to foreign governments. Due to the nature of the manufacturing process, it is not possible for Technical Ordnance to order the precise amount of explosives or component chemicals needed For a contract. They would frequently have explosives left over after completion of a contract. Technical Ordnance would have used these left over materials for foreign contracts only with government approval. The contract administrators have in the past, when asked about disposition of surplus explosives, told Technical Ordnance to destroy them, or to hold onto them "you'll get another contact", or to go ahead and use them. Mr. Yuhas was asked for sample invoices of their commercial purchases of explosives for foreign sales. He at first implied that would be no problem. However, when he was pressed further for them, Yuhas stated that probably almost all explosives for foreign destinations were made from surplus military explosives.

Mr. Hoffman was informed that Technical Ordnance's compounding of chemicals which resulted in the manufacture of an explosive is an activity requiring an explosives manufacturers license. An exemption to this licensing requirement would apply if the manufacture were done pursuant to a government contract. Since Technical Ordnance makes some commercial sales to foreign governments a manufacturers license will be required of them. Mr. Hoffman was told to cease activities requiring a license until the license was obtained. Specifically he was told not to manufacture explosives, not to purchase explosives from out of state sources, and not to transport explosives in interstate commerce unless this was done pursuant to a government contract. The assembly for commercial purposes of devices with finished explosives obtained within state would not be prohibited. Mr. Yuhas asked if surplus explosives obtained from an out of state source pursuant to U.S. contract could be used in a commercial product during the period they were unlicensed. He was told that ATF would not take exception to this provided the explosives truly were surplus from a U.S. contract and that this was not a subterfuge to circumvent the licensing requirement.

Mr. Hoffman was questioned and confirmed that Technical Ordnance has continued manufacturing explosives for commercial purposes even after being contacted by Inspector Crivello. He stated that Inspector Crivello had only told him not to ship completed items to foreign governments and had not told him to stop manufacturing explosive materials. Area Supervisor Kodadek responded to this saying that he, Kodadek, had also told him on the phone to stop manufacturing. Mr. Hoffman stated he had requested that in writing. Area Supervisor Kodadek denied that Mr. Hoffman had made such a request. Finally, Mr. Hoffman stated that this would shut Technical Ordnance down and a lot of people would be without work.

Technical Ordnance has no current contracts to manufacture training grenades and has never manufactured the modified "stun" grenade that had been manufactured by Dela-Tek, an affiliate of Technical Ordnance. Mr. Hoffman stated that he disagreed with ATF's ruling that this stun grenade was a destructive device based on his interpretation that the end use of the grenade was not for destructive effect. He was informed that ATF's ruling in such matters were binding and that Technical Ordnance would need a Manufacturer of Destructive Devices license to make these items. He was further informed that there was no licensing exemption even if the destructive devices were made solely for the use of the U.S. He was told that there would be an exemption from Special Tax requirements under the Gun Control Act if all destructive devices were made solely for the U.S. and if Technical Ordnance applied for the exemption. Mr. Hoffman, Mr. Yuhas and Mr. Harmon were questioned at several points regarding Technical Ordnance's product line and they could recall no items that might fall into the destructive device category. The only items they were uncertain of were the fusing devices for bombs and torpedos. They were informed that ATF does not treat such components as destructive devices at this stage of manufacture. However, they were informed that such items would be subject to the Explosives Control Act unless the items were being made pursuant to U.S. contract. Any interstate or foreign shipments not pursuant to U.S. contract would require an explosives license. They were told that the Explosives Manufacturers license they have applied for would satisfy this requirement. They were urged to request destructive device rulings from ATF on any item they might manufacture if they had any doubt as to its classification.

Technical Ordnance does not at this time manufacture components for small arms ammunition. They were informed that the manufacture of some components of small

arms ammunition could require a Manufacturer of Ammunition for Other Than Destructive Devices License under the Gun Control Act. They were also informed that there is no exemption to this licensing requirement even if the manufacture is pursuant to U.S. contract.

Mr. Hoffman was informed that line cutters, explosive bolts and other similar devices fall into a category, when completed, of "propellant actuated devices" or "industrial tools" and are no longer treated as explosives. Commercial shipments of them can be made with no explosives license, no storage requirements apply, and none of the specific disposition records required of licensees apply. He was informed that he could obtain a ruling as to this classification for any production item he was uncertain about. He was informed that it was not necessary for him to obtain such a classification for every variation in cutter design. He was informed that ATF would impose no prohibition on commercial shipments of any such devices, even items currently in stock which were illegally manufactured without an explosives manufacturers license.

s/
John Kodadek

s/
Donald L. Willer

August 16, 1990
St. Paul, Minnesota

UI 35130 900249

Technical Ordnance
d/b/a Tek Ord
634 Industrial Boulevard
Waconia, Minnesota 55387

MN-20-00303 (Manufacturer/High Explosives)

PURPOSE:

1. To determine it explosives are acquired or specifically manufactured for use in the manufacture of products for Foreign Military Sales (FMS).
2. To determine if proper records are being maintained for any explosives acquired for FMS.
3. To determine it all explosives are being stored in compliance with ATF Regulations.

SOURCE:

John Yuhas, Vice President, Tek Ord, was interviewed. See Attached Report of Interview.

The following proprietor's records were examined:

Job Board 1990 - Listing of all ongoing contracts - Exhibit 2
Receiving Report - Exhibit 2
Daily Material Receipt - Exhibit 2
Inventory Balance Sheet (by product) - Exhibit 2
Explosives Movement Documents - Exhibit 3
Received to Stock
Issued from Stock
Returned to Stock

Change of Storage
Location

Inventory - Exhibit 4 - Sorted by Material
Sorted by Location
Site Inspection of Storage Magazines

FINDINGS:

1. Foreign Military Sales (FMS) comprise less than five percent (5%) of total business activity. Explosives used in the production of items for FMS were requisitioned under a DOD contract but are not provided by DOD, and are not acquired or manufactured specifically for FMS.
2. Records of receipt of explosives are properly maintained for all explosives materials, FMS and DOD.
3. Proprietor does not maintain a separate and distinct Summary of Daily Magazine Transactions. A combination of records contain required information except Manufacturer's Name/Brand Name.
4. Explosives are being stored in the right type of magazine and in compliance with the American Table of Distances.
5. All magazines contain exposed ferrous metal. All other construction specifications meet federal regulations for type 1 magazines.

CONCLUSIONS:

Tek Ord complies with DOD storage requirements for explosives. DOD regulations are more restrictive than ATF's regarding segregation by class/type/kind, Quantity Distance, and Fragmentation Distance. However, ATF magazine construction requirements are more restrictive than those imposed by DOD. Tek Ord's storage magazines were found to be in violation of 27 CFR 55.207(a)(11). Ferrous metal angle iron on interior of magazine was not

coated with a non-sparking material. Violation was cited on ATF F 5030.6. Tek Ord is in compliance with all other ATF storage regulations.

No separate records for acquisition or manufacture of explosives for FMS are kept. Records are kept for the receipt and use of all explosives and contain required information. Explosives acquisition and manufacture under the regulation of Part 55 are accounted for by existing records.

Tek Ord does not maintain a separate record of Daily Summary of Magazine Transactions that complies with 27 CFR 55.127. Violation was cited on ATF F 5030.6.

s/	s/	s/
Nancy A. Rysavy	Wendie M. Miller	Rob Schellhorn
Inspector, ATF	Inspector, ATF	Inspector, ATF

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

C: F: F: LAD
55.141

OCT 31 1991

MEMORANDUM TO: Area Supervisor John Kodadek
St. Paul, Minnesota

FROM: Chief, F&E Operations Branch

SUBJECT: Recordkeeping and Storage Requirements for DOD Contractors

This is in response to your memorandum dated September 17, 1991, in which you request clarification concerning the accountability of explosive materials manufactured, stored, and distributed by DOD contractors. Specifically, when does DOD regulatory authority end and ATF's authority under 27 CPR part 55 begin.

The exemption in 55.141(a)(5) for DOD contractors would apply to the U.S. government contract work done solely for the DOD. This exemption would not apply to the remaining business conducted on behalf of foreign allies or non-government work.

In reading your memorandum, it appears that Tek Ord is maintaining records of acquisition and disposition. Also, their explosive storage magazines comply with ATF requirements. Although Tek Ord's recordkeeping and storage of explosive materials are not segregated from other operations, we don't see any violation on the part of this company.

If the company was not maintaining the proper records or not storing explosives in conformity of our regulations, then we could see the need for the company to segregate or identify those explosives exempt from regulation as opposed to those that would be subject to 27 CFR part 55.

Linda Deel, a Specialist within my branch, contacted the Defense Logistics Agency (DLA) regarding the responsible organization that would enforce the Department of Defense (DOD) regulatory controls for DOD Contractors. Linda was referred to the Defense Contract Administration Services (DCAS) within DLA. We were advised that inspectors within DCAS conduct regular inspections on DOD contractors. You may want to consider establishing a liaison contact with DCAS in your area to coordinate future joint inspections of DOD contractors.

s/
Louis M. Krivitsky

U.S. Department of Justice

United States Attorney
District of South Dakota

Shriver's Square (605) 330-440
230 S. Phillips Avenue FAX (605) 330-440
Suite 600
Sioux Falls, South Dakota 57102

February 23, 1994

Mark Trimble
Special Agent - ATF
400 S. Phillips Ave.
Room B-19
Sioux Falls, SD 57102

Re: Tech Ord

Dear Mark:

On behalf of the United States Attorney's Office for the District of South Dakota, I wish to extend sincere mega-thanks for the assistance your office provided in the prosecution of Technical Ordnance, Inc. and Norman H. Hoffman.

Your support of this case, from its inception, through search warrant and grand juries and pretrial preparation and trial, were most appreciated. I especially appreciated your resourcefulness in arranging assistance through the office of Assistant Chief Counsel in Chicago. (I have also written Lenore Kaplan, thanking her profusely, and sincerely, for Bill Fox's assistance.) I seriously doubt whether I could have withstood the barrage of pretrial motions without Bill's assistance.

Special thanks, also, for allowing Karrie to devote a great deal of her time to provide staff support, both pretrial and during the first week of trial when all of our witnesses were arriving, and things were chaotic at our makeshift office in Aberdeen. Without her assistance, we would have had an extremely difficult time meeting court-imposed deadlines for production of our many documentary exhibits.

Thanks, too, for freeing up Doug Moore to assist pretrial and throughout the trial. Doug was the only Government witness who was allowed to remain in the courtroom. He was granted a special exemption from the sequestration order, due to his critical role in the factual development of the case. Doug worked tirelessly throughout the trial, often putting in horrendous hours. Although Jon Petersen was sentenced to less time in frigid Aberdeen, his photographic and video exhibits were important to the development of our case.

Ted has perhaps shared with you the preliminary feedback from the jury. Their sentiment appeared to be that we had overcharged, and that this case "should have been settled over coffee." I obviously failed to communicate convincingly that it is impossible to bargain at arms length with someone who is lying to you, and going to extreme measures to evade accountability.

Despite the most disappointing result (full acquittal), I believe we gave them a good fight. Your assistance was greatly appreciated.

Sincerely,

KAREN E. SCHREIER
UNITED STATES ATTORNEY

LeAnn Larson LaFave
Assistant U.S. Attorney